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**‘MORE-THAN-HUMAN’ FAMILIES IN
MULTI-SPECIES TENANCIES: A
CRITICAL ANALYSIS OF ‘NO PET’
COVENANTS AND THE LAW**

D J ROOK

DLaw

2021

‘MORE-THAN-HUMAN’ FAMILIES IN MULTI-SPECIES TENANCIES: A CRITICAL ANALYSIS OF ‘NO PET’ COVENANTS AND THE LAW

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A portfolio submitted in partial fulfilment of
the requirements of the University of
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of Professional Doctorate

Research undertaken in Northumbria Law
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Abstract

'No pet' covenants restrict or prohibit the keeping of companion animals in rented housing. They affect millions of tenants across the United Kingdom and yet have received very little consideration in the academic law literature. My research seeks to address this knowledge gap by understanding the lived experience of 'no pet' covenants for pet-owning tenants.

By reference to different models of family including Morgan's 'family practices' approach, my research shows how people construct companion animals as family members. I argue that the human-companion animal relationship falls within the meaning of 'private life and family' under Article 8, European Convention on Human Rights. The depth of analysis with which I examine human rights arguments in the context of 'no pet' covenants is an original contribution to the field.

Embracing qualitative research methods, I conducted seven in-depth interviews with pet-owning tenants adversely affected by 'no pet' covenants to assess the type and magnitude of the harm they endured. I used three methods of data analysis: firstly, thematic content analysis of the interviews; secondly, narrative analysis of stories I crafted from four of my interviews; thirdly, black letter law analysis of the current law affecting the use and enforcement of 'no pet' covenants in England.

My findings provide a framework for Parliament to assess the need for legislation to regulate the use of 'no pet' covenants. The paucity of academic research makes it difficult for politicians to engage in an informed debate. My research provides understanding of how the covenants affect one of the key stakeholders, namely pet-owning tenants. Since companion animals are perceived as family members, the covenants can result in significant harm to tenants sometimes having life-changing consequences. I suggest a reconceptualization of 'no pet' covenants from *controllers of risk* to *contributors of harm*. My empirical study constitutes a valuable exploratory pilot study that paves the way for a more comprehensive study to investigate the experience of all the stakeholders, including landlords. I present a Fair Housing framework to guide Parliament in balancing the disparate rights of all those affected. Drawing on Mill's harm principle as developed by Feinberg, I propose a balancing strategy within the context of a Harm Assessment.

Table of Contents

1	CRITICAL COMMENTARY	1
1.1	Setting the scene: identifying ‘no pet’ covenants in residential leases as a social and legal problem	1
1.1.1	The scale of the use of ‘no pet’ covenants in England	1
1.1.2	Identifying ‘no pet’ covenants as a social problem	4
1.1.3	Identifying ‘no pet’ covenants as a legal problem	6
1.2	My theoretical assumptions as a social constructionist	8
1.3	My research aim, questions and methodology	12
1.3.1	The co(a)gency of multispecies tenancies	13
1.4	My original contribution to the field	18
1.5	The nature of the human-companion animal relationship	20
1.5.1	The history of the human-pet relationship: defusing conflict	21
1.5.2	Understanding the motivations for keeping pets	25
1.5.2.1	Developing social relationships	26
1.5.2.2	The health benefits of the human-companion animal relationship	27
1.6	The sociology of family: pets as family members	29
1.6.1	My theoretical assumptions on constructing ‘family’	29
1.6.2	Morgan’s theory of family practices	34
1.6.3	Pets as family: adapting theoretical tools from Child law	38
1.6.4	The expansion of the legal definition of family to include companion animals	43
1.6.5	Recognising pets as family under English housing law	49
1.7	The ambivalence surrounding human-animal relations	52
1.8	The legal status of companion animals	54
1.8.1	The property versus legal personhood debate	55
1.8.2	A relational approach for companion animals	58
1.9	‘No pet’ covenants in residential leases	62
1.10	My research findings	65
1.10.1	A Harm Assessment: an analysis of harm	70
1.10.1.1	The question of consent	71
1.10.1.2	The nature of harm	73
1.10.1.3	Assessing and comparing harms	76
1.11	My research findings on assessing the need for legislation	83
1.11.1	Changes in people’s perception of pets as family	83
1.11.2	Changes in the availability of research on the benefits of pet ownership	83
1.11.3	Changes in the housing sector	84

1.12	Future research.....	86
2	PORTFOLIO COMPONENT 1 – my relevant publications.....	87
2.1	For the Love of Darcie: Recognising the Human–Companion Animal Relationship in Housing Law and Policy.....	87
2.2	Who Gets Charlie? The Emergence of Pet Custody Disputes in Family Law: Adapting Theoretical Tools from Child Law	102
2.3	Challenges to the legal status of domestic and captive animals	116
2.4	Rook, D (2001) <i>Property Law and Human Rights</i> . Blackstone Press.....	123
	123
3	PORTFOLIO COMPONENT 2 – Understanding my research methods and methodology	142
3.1	Introduction	142
3.2	The story of my DLaw research journey	142
3.3	My research aim and questions.....	146
3.4	My literature review	147
3.5	My decision to use qualitative research methods.....	151
3.6	My sampling technique.....	154
3.7	My interview technique.....	158
3.8	My methods of data analysis	163
3.8.1	Phase one: Thematic content analysis of seven in-depth interviews using NVivo 12	167
3.8.2	Phase two: Narrative analysis of four interviews	172
3.8.3	Phase three – black letter law analysis	176
3.9	Research quality.....	177
3.10	Limitations of my empirical research.....	180
3.11	Conclusion.....	181
4	PORTFOLIO COMPONENT 3 - Ethics.....	182
4.1	Ethics process and documentation.....	182
4.1.1	Informed consent.....	182
4.1.2	Data protection and storage.....	182
4.1.3	My Northumbria University Ethics application form (2017).....	184
4.1.4	Research information sheet.....	192
4.2	Ethical considerations arising during the research.....	195
5	PORTFOLIO COMPONENT 4 - Analysis of Interviews	196
5.1	Introduction	196
5.2	Section 1, Part I Thematic Content Analysis- How people in the UK construct companion animals as family members in everyday practices	197
5.2.1	Conceptualising pets as family members	197

5.2.2	First Theme – AGENCY: Everyday Practices	201
5.2.2.1	Agency: Influencing household decisions	204
5.2.2.2	Agency: Detrimental Changes to Everyday Practices	206
5.2.3	First Theme - AGENCY: Anthropomorphic model.....	209
5.2.4	First Theme - AGENCY: Affecting human-human interactions	210
5.2.5	Conclusion to Agency theme	212
5.2.6	Second theme: Social Support	214
5.2.7	Third theme: Ambivalence.....	217
5.2.8	Conclusion to section 1, Part I.....	218
5.3	Section 1, Part II – Thematic Content Analysis: How people in the UK experience a ‘no pet’ covenant in their residential lease.....	220
5.3.1	Theme one: Rental insecurity arising from hiding undeclared pets	220
5.3.2	Theme two: Lack of Choice	222
5.3.2.1	Lack of Choice: The poor quality of pet-friendly housing due to its low availability 223	
5.3.2.2	Lack of Choice: The effect of ‘no pet’ covenants on tenants.....	225
5.3.3	Theme three: Powerlessness in Negotiations and perceived Discrimination	226
5.3.4	Theme four: Adverse effect on tenant’s Mental Health.....	229
5.3.5	Theme five: Ambivalence to animals: a lack of understanding by housing officials ..	230
5.3.6	Conclusion to section 1, Part II	231
5.4	Section 2: Narrative Analysis	233
5.4.1	Bob – A story of sacrifice.....	233
5.4.1.1	Additional understanding of Bob’s experience from a narrative analysis.....	235
5.4.2	Kate – a story of loss	240
5.4.2.1	Additional understanding of Kate’s experience from a narrative analysis.....	243
5.4.3	Julia – a story of suffering	248
5.4.3.1	Additional understanding of Julia’s experience from a narrative analysis	251
5.4.4	Lucy and Josh – a story of stealth	255
5.4.4.1	Additional understanding of Lucy and Josh’s experience from a narrative analysis 257	
5.4.5	Key themes from the Narrative Analysis	258
5.5	Conclusion.....	259
6	PORTFOLIO COMPONENT 5 – Multi-species tenancies in England: a critical analysis of the current state of the law on ‘no pet’ covenants and recommendations for legal reform.....	261
6.1	Introduction	261
6.2	Relevant findings from my literature review and data analysis	261
6.3	Two legal questions	263

6.4	The first legal question: Is it fair and reasonable to include a ‘no pet’ covenant in a lease?	265
6.4.1	‘No pet’ covenants as an unfair term under the Consumer Rights Act 2015	265
6.4.2	The exclusion of dogs.....	267
6.5	The second legal question: can a breach of a ‘no pet’ covenant be <i>enforced</i> in the courts?	268
6.5.1	Public sector housing: Secure tenancy (council tenant) and Assured tenancy (Housing Association tenant)	268
6.5.1.1	The reasonableness test in repossession cases: identifying relevant circumstances	269
6.5.1.2	The approach of the court to a breach of a ‘no pet’ covenant: existing case law..	271
6.5.1.3	The reasonableness test and an assessment of harm	274
6.5.1.4	Summary of the reasonableness test as applied to ‘no pet’ covenants	275
6.5.2	Public sector housing: Introductory tenancy	275
6.5.2.1	Does the human-companion animal relationship come within private life and family under Article 8 ECHR?	276
6.5.2.2	Should the court consider the human-companion animal relationship within the Article 8 defence in possession proceedings?	280
6.5.2.3	The wider application of bringing companion animals within Art.8 ECHR	281
6.6	Private sector housing: Assured Shorthold tenancy (AST)	283
6.7	Assessing the need for legislation in England to regulate the use of ‘no pet’ covenants ..	286
6.7.1	Two Frameworks for Change	288
6.7.1.1	Human Rights Framework.....	290
6.7.1.2	Fair Housing framework.....	292
6.7.2	Legislation in other jurisdictions	297
6.7.3	Positive pet policies in social housing in England and overseas	299
6.8	Conclusion.....	300
	Appendices.....	301
	Appendix 1: Scottish Parliament briefing paper	301
	Appendix 2: Mother’s day card.....	304
	Appendix 3: My process of coding – moving from codes to identifying key themes	305
	Appendix 4 - Interview Guide 2018	310
	References	312

List of figures

Figure 1 - How my theoretical assumptions underpin my research design	11
Figure 2 - The interrelationship between the four areas of my literature review	17
Figure 3 - The Harm Assessment approach	82
Figure 4 - How my DLaw evolved and developed over time in response to external influences.....	145
Figure 5 - My DLaw research process (years 2 and 3) demonstrating the links between my three methods of analysis	166
Figure 6 - Examples of mind maps in my reflexive journal	169
Figure 7 - AGENCY theme arising from research question 1: 'How do people in the UK construct companion animals as family members in everyday practices?.....	200
Figure 8 – SOCIAL SUPPORT theme arising from research question 1: How do people in the UK construct companion animals as family in everyday practices?.....	216
Figure 9 - AMBIVALENCE theme arising from research question 1: 'How do people in the UK construct companion animals as family in everyday practices?.....	219
Figure 10 – Map showing the links between the themes from tenants' experiences of 'no pet' covenants.....	232
Figure 11 - The different themes arising from using content and narrative analysis: Bob and Darkie	238
Figure 12 - The different themes arising from using content and narrative analysis: Kate, Roxie and Honey	246
Figure 13 - The different themes arising from using content and narrative analysis: Julia and Annie	253
Figure 14 - The legal issues arising from the use of 'no pet' covenants	264
Figure 15 - 'No pet' covenants and the current law in England	285
Figure 16 - Linking the law and theory and the significance of the Harm theme.....	287
Figure 17 - Two Frameworks for Change	289
Figure 18 - The application by courts and Parliament of a Harm Assessment to 'no pet' covenants	296

List of Tables

Table 1 - Academic articles (published in English) on 'no pet' covenants from my literature review	148
Table 2 – My research participants and their companion animals.....	158
Table 3 – Context of the interview and participant's prior knowledge of my views.....	160
Table 4 - The general format of my initial interviews.....	162
Table 5 - The quality of my research based on Lincoln and Guba's trustworthiness criteria.....	179

Table of Cases

A.F.A.D.A about the chimpanzee ‘Cecilia’ – non-human individual. (2016) File No. P-72.254/15, Mendoza, 3 November. Available at : https://www.nonhumanrights.org/content/uploads/Chimpanzee-Cecilia_translation-FINAL-for-website-2.pdf (Accessed: March 2017).

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[Table of Legislation](#)

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European Convention on Human Rights

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The Pets (Theft) Bill 2018

Renters' Reform Bill 2019-20

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I would like to express my thanks to my supervisors especially my principal supervisor, Professor Ray Arthur, who provided valuable support and encouragement over the years.

Special thanks to my family, Chris, Ben and Stan (our greyhound adopted from the Retired Greyhound Trust) for their unwavering love and support.

In memory of Bob Harvey (1930 – 2020) and Stan (2009 – 2020)

Declaration

I declare that the work contained in this portfolio has not been submitted for any other award and that it is all my own work. I also confirm that this work fully acknowledges opinions, ideas and contributions from the work of others.

Any ethical clearance for the research presented in this portfolio has been approved. Approval has been sought and granted by the University Ethics Committee on 17 January 2017 with the amendment to my application approved on 9 November 2017.

I declare that the Word Count of the Portfolio is 108,000 words (excluding copies of my research publications, the appendices and references). The critical commentary is **38,600** words.

Name: Deborah Jane Rook

Signature:

Date: 07 January 2021

1 CRITICAL COMMENTARY

1.1 Setting the scene: identifying ‘no pet’ covenants in residential leases as a social and legal problem

“Man prescribed emotional support dog faces eviction for having a pet”.

(Brazell, E. (2019) *The Metro*, 29 November).

“Evicted family forced to live in a van after refusing to be parted from two dogs”.

(Hind, S. (2019) *Scottish Daily Record*, 14 March).

“Tenants ordered to give up their dogs or move out”.

(Gedge, A. (2018) *Cambrian News*, 31 January).

‘No pet’ covenants have received recent media coverage but are relatively unknown in academic legal research. By the end of 2017, when I started researching ‘no pet’ covenants, there were only three articles on the topic in peer reviewed academic law journals (Huss, 2005; Campbell, 2009; Palluzi, 2013) all of which are specific to the federal and state laws of the United States of America (USA) or Canada. My research seeks to fill a significant gap in the law literature on ‘no pet’ covenants by providing the first in-depth analysis of the law in England relating to the use and enforcement of ‘no pet’ covenants. For my research project a ‘no pet’ covenant is defined as a leasehold covenant (or policy incorporated into the tenancy agreement) that prohibits or restricts the tenant from keeping companion animals in their rental housing accommodation. Some covenants exist as blanket bans and exclude all companion animals from the property, others exclude certain species commonly cats and dogs, and others are qualified covenants that permit pets only with the landlord’s prior consent.

1.1.1 The scale of the use of ‘no pet’ covenants in England

In England, the decision as to whether a tenant can keep a companion animal in a residential tenancy rests with the landowner and tenant; housing legislation is silent on the matter. Underpinning this approach are the legal principles of personal autonomy and freedom of contract; the personal autonomy of landowners to control the use of their land and the freedom of contract of the parties to negotiate a lease on terms acceptable to both. However, this *laissez-faire* approach needs to be set against the backdrop of a current housing shortage in the United Kingdom (UK) (Wilson and Barton, 2020) and the growth of the private rental sector which almost doubled in size between 2000 and 2012 (Beckett, 2014). Britain’s post-homeownership society has seen the emergence of ‘generation rent’

largely represented by young people excluded from owner-occupation (Ronald and Kadi, 2018). The growth in the private rental sector has been accompanied by the growth of “*small-time landlords*” (middle-aged, relatively affluent people who own one or two properties to let), an increase of over one-million in the last decade (Ronald and Kadi, 2018 at p. 787). In consequence of this changing sector, the contractual freedom of tenants in the private rental housing market is illusory; the increased number of private tenants seeking scarce housing means tenants have no bargaining strength in negotiations with the landlord. As a result, the landlord is able to dictate the terms of the lease and can readily find another tenant if a prospective or current tenant is not happy with a ‘no pet’ covenant in the lease. A pet-owning tenant cannot simply move elsewhere when there is little or no choice in alternative pet-friendly housing in the desired location and price range (Smith, 2011), and therefore may feel there is no option but to accept the lease with its undesirable ‘no pet’ covenant.

Companion animals are common across households in the UK (40% of households own pets the majority being dogs (25%) and cats (17%)) (PFMA, 2019). Many of these will live in owner-occupied homes but others live in rental housing and I refer to these as multi-species tenancies because the tenancy provides a living space for both humans and their companion animals. Despite the large percentage of pet-owning households, covenants that prohibit or restrict the keeping of companion animals in residential leases appear to be a common occurrence especially in the private rental sector. There are no official statistics on the number of rental properties with pets (whether public or private sector) so it is difficult to ascertain reliable data on the scale of the use of ‘no pet’ covenants. The National Landlords Association (NLA) have reported that 55% of private landlords exclude pets (NLA, 2017, p.3) and a recent online survey of 985 private landlords found that 58% exclude pets (Cats Protection, 2019) while research by Shelter Scotland suggests this figure is lower in Scotland at 48% (Shelter Scotland, 2018, p. 13). A recent government press release stated that

“around 7% of landlords advertise homes as suitable for pets” (Ministry of Housing Communities and Local Government, MHCLG, 2020a).

This figure seems inconsistent with the other sources because it only includes housing that is openly advertised as pet friendly. Of the 45% of private landlords that allow pets (NLA, 2017) it appears that only 7% actually advertise as pet friendly.

These figures suggest that over half of landlords in the private sector exclude pets but how many of these tenants are adversely affected by the inclusion of the ‘no pet’ covenant? Some tenants may want a ‘no pet’ covenant included in their lease giving reassurance that

animals have not previously lived in the property; others will be indifferent to the presence of the covenant. In a tenant survey conducted by the letting agent Homelet in which 20,388 responses from tenants in the UK's private sector were analysed, 44% of the tenants said that they did not have a pet in the property due to the terms of the tenancy, which prohibited it (Homelet, 2017). This compared to 33% of tenants who chose not to keep a pet by personal choice and 23% of tenants who lived with a pet. These statistics can be used to estimate the number of tenants adversely affected by 'no pet' covenants. In 2019 there were 23.5 million dwellings in England of this 15 million were owner-occupied (64%) and 8.5 million were rented housing (37%) (MHCLG, 2020b at p, 5). Within the rental sector, 4.6 million dwellings are private rentals and 4 million are social rentals. If approximately half of private landlords in England exclude pets that affects 2.3 million households and if approximately 44% of those would like to own a pet (based on the findings of the Homelet survey) but are prevented from doing so by a 'no pet' covenant that affects over one million households. Taking into account the fact that many of these one million households include two or more persons and adding tenants in social housing into the equation, it is clear that 'no pet' covenants are affecting millions of people in England every year and yet little is understood about the impact of these covenants on tenants, companion animals, landlords and wider society.

Housing policy in the UK has traditionally promoted homeownership, positioning renting in the private sector as being short term and transitional, visualised as a 'stepping stone' to home ownership (Power, 2017). Government policy promotes homeownership by supporting first time buyers to get onto the property ladder, for example, the Help to Buy scheme launched in 2013 (HM Government, 2013). Owner occupation reached its peak in 2003 and has gradually declined since then to its current level of 64% (MHCLG, 2020). As home ownership declines, more and more people live in rented housing, so the scale of the problem caused by 'no pet' covenants is set to increase. Research in 2018 found that 40% of millennials in the UK – those born between 1980 and 1996 - rent privately at the age of thirty and up to 16% of them will rent for life never able to afford home ownership (Judge and Tomlinson, 2018). These people are denied the opportunity to live with a companion animal if the use of 'no pet' covenants continues to be unregulated.

In the social housing sector landlords appear to be more tolerant of companion animals. A recent report by Cats Protection found that 82% of local authority and housing association landlords allow tenants to keep pets (Cats Protection, 2019, p. 14). This figure is significantly higher than in the private sector, but even within the social housing sector there are inconsistencies of approach. A report by Battersea Dogs Home on social housing in London found inconsistent policies on the keeping of dogs in flats: 64% of Housing Associations and

21% of Local Authorities in London banned dogs in flats with communal entrances and no private garden (Battersea, 2018, p. 6).

1.1.2 Identifying 'no pet' covenants as a social problem

In problematizing 'no pet' covenants my research seeks to demonstrate the harm that can be caused to tenants, animals and wider society. It is acknowledged, however, that the use of the covenants also provides benefits especially for landlords. Research by the National Landlords Association shows that the use of 'no pet' covenants by landlords and letting agents is driven by a desire to avoid harm in the form of damage to property or annoyance to neighbours (NLA, 2017). Harm is a dominant theme to emerge from my interviews with seven pet-owning and understanding the character and magnitude of this harm became a key focus of my research. My argument is that understanding the use of 'no pet' covenants and their enforcement at law through the lens of harm allows a revaluation of 'no pet' covenants and the adequacy of the law around them. Drawing, by analogy, on the work of Feinberg and his assessment of the legitimacy of state interference with individual liberty by reference to harm, I use the concept of harm to assess the appropriateness of legislation to regulate the use of 'no pet' covenants.

The use of 'no pet' covenants flows from

“rental policies and cultural norms that view pets as a property risk and that fail to recognise these significant others as key household members” (Power, 2017, p. 356).

Therefore, the cultural framing of pets through notions of risk specifically as a risk to property and investment (Carlisle-Frank, 2005) need to be revisited. Concentrating on the nature and significance of the human-companion animal relationship to tenants, animals and wider society shifts the focus of 'no pet' covenants away from the positively framed concept of a 'controller of risk' to a more negatively framed notion of 'contributor to harm' highlighting the harmful effects of the covenant to people and animals. My purpose is to reveal the importance of the human-companion animal relationship to residential tenants, something which is at odds with the current legal status of domestic animals as property. Relegating a tenant's forced separation from a companion animal to the realms of property loss understates the impact of the separation on the tenant's life. Fox and Ray suggest that the forced separation of older people from their pets when they move into a care home is experienced as a *“bereavement”* akin to the loss of a family member (2019, p. 211).

The legal status of pets as property promotes the idea of pets as disposable items permitting landlords to feel it is acceptable to request a tenant to surrender their companion animal in order to secure rental accommodation. Studies conducted in the UK, USA and Australia

investigating the reasons for relinquishing dogs to a shelter found that for owner-related reasons (as opposed to animal-related reasons such as behaviour) the most common reason given by owners was 'moving home' and the restrictions imposed by landlords were a key factor (Shore, Petersen and Douglas, 2003; Coe *et al*, 2014). The Dogs Trust reported that 848 dogs were surrendered to them for rehoming in 2018 due to the existence of a 'no pet' covenant in the dog owner's lease which amounted to 8.7% of all dogs surrendered to them in that year (Dogs Trust Annual Review, 2018). Other research calculates the figure as 10% of all dogs surrendered for rehoming (PFMA, 2017), which for Battersea equates to 200 dogs a year (Battersea, 2018). Given the many animal rehoming centres across the country it is likely that the number of dogs needing to be rehomed due to 'no pet' covenants in leases runs into many thousands and this figure escalates substantially when cats are included. There is an economic cost to society when shelters and charities need to rehome companion animals so the fact that these animals already have families who want to keep them represents a waste of societal resources (Stavisky *et al*, 2012; Graham *et al*, 2018). At an individual level, the forced separation raises significant welfare concerns for the animals themselves who face the stress of being separated from their owners, living in kennels, adapting to a new home or, in some cases, euthanasia (Fox and Ray, 2019). This raises the question of the extent to which courts, policymakers and lawmakers in the housing arena take the welfare interests of companion animals into account. As property, their interests can be easily trumped by human interests however trivial (Francione, 1995; Wise, 2000) but categorising them as kin (Fox, 2004) opens the door to a different approach (Kymlicka, 2017). Fox and Ray recognise this in the context of 'no pet' policies in residential homes for older people and identify the need

"to re-think the status of companion animals as property" (2019, p. 212).

While statistics can demonstrate the scale of the problem of 'no pet' covenants, it is individual stories that demonstrate the depth of feeling it creates. One such example from 2017 illustrates that vulnerable people are especially susceptible to be disadvantaged because of their lack of choice over where they live. The elderly, mentally ill and homeless are more likely than the average population to need to move into care or sheltered accommodation due to their health and care needs or their personal circumstances. If the accommodation prohibits pets, the vulnerable person is faced with the difficult choice of giving up their companion animal or giving up their housing place (Irvine, 2013a; Carr, 2016; Rook 2018). This was the dilemma faced by John Chadwick, a homeless man with mental health problems, who gave up his two small dogs and cat when the council found him accommodation that prohibited pets. If he refused the flat, he would make himself intentionally homeless and if he accepted it, he would have to give up his companion

animals for rehoming. Ten days after surrendering his companion animals, John committed suicide and at the subsequent inquest the coroner found that the loss of his companion animals was a 'key factor' in his death (Slater, 2017). John is not alone in developing close, socially supportive relationships with companion animals. A key focus for my research is understanding the nature of the human-companion animal relationship and its implications for housing law, policy and practice in the context of multi-species tenancies. Currently housing policy rarely considers companion animals as valued members of the household. Power recognises the need for policy to reflect the multi-species nature of households,

"The enhanced spatial and emotional proximity of companion animals within contemporary households is typically ignored and sometimes directly challenged through tenancy policy that imagines household units as exclusively human" (2017, p. 342).

My research adopts a function-based approach to theorising family drawing on Morgan (1996) to demonstrate how companion animals may constitute family in the everyday practices of the family home. Pets may also be defined as family through their provision of support and the quality of the relationship they share with their owners (Charles and Davies, 2008; Charles, 2014). This raises the legal question of whether the human-companion animal relationship may come within 'private life and family' protected under Article 8 of the European Convention on Human Rights (ECHR) as incorporated into domestic law under the Human Rights Act 1998 (Rook, 2018; Fox and Ray, 2019). Under the first paragraph of Article 8,

"Everyone has the right to respect for his private and family life, his home and his correspondence".

The second paragraph of Article 8 sets the boundaries for a legitimate interference with these rights by the state. This permits the interference with private life and family where it is in accordance with the law and necessary in a democratic society which includes the protection of the rights and freedoms of others. If the courts accept that the human-companion animal relationship comes within Article 8, it will have implications for the use of 'no pet' covenants under English law.

1.1.3 Identifying 'no pet' covenants as a legal problem

The use of 'no pet' covenants in residential leases raises a number of legal questions in English law (some of which will be affected by the decision on the relevancy of Art.8 ECHR to human-companion animal relationships): Firstly, does the inclusion of a 'no pet' covenant in a tenancy agreement constitute an unfair term under the Consumer Rights Act 2015?; Secondly, can a breach of a 'no pet' covenant be enforced in the courts?; Thirdly, is

legislation needed to regulate the use of 'no pet' covenants in residential leases in England? The idea of introducing legislation is not new and the incorporation of a review of 'no pet' covenants in Labour's Animal Welfare Manifesto 2018 (Everall-Pettersen, 2018) may explain the recent increased research activity in this area by housing and animal welfare organisations (Shelter Scotland, 2018; Battersea, 2018; Cats Protection 2019; Simon Community Scotland, 2019). Labour's Animal Welfare Manifesto 2018 stated its intention to consult with tenants and landlords,

"so that tenants can keep pets as a default unless there is evidence that the animal is causing a nuisance, or its welfare is compromised" (2018, p. 5).

In January 2020 the new Conservative Government announced its intention to overhaul the model tenancy agreement *"to help end pet bans"* by removing restrictions on keeping well-behaved pets in the private sector (MHCLG, 2020a). This does not change the law and may have little practical impact on the content of tenancy agreements because private landlords are not required to use the model tenancy agreement. However, the proposed changes bring 'no pet' covenants into the limelight and encourage public debate on their use. On 14 October 2020 a Private Members' Bill titled 'Dogs and Domestic Animals (Accommodation and Protection) Bill 2019-21' was introduced into Parliament by Andrew Rosindell MP to regulate the use of 'no pet' covenants in residential leases in England. He proposes prohibiting the use of 'no pet' covenants where tenants pass a test of responsible pet ownership, their animal is well-behaved, and the property is suitable for the pet. The Bill is still being prepared for publication and I have been asked to give feedback on the first draft. The Bill is listed for a second reading in Parliament on 26th February 2021.

Labour's Animal Welfare Manifesto 2018 proposed exploring ways in which the elderly, disabled and homeless can keep their pets with them when they move into care homes, hostels and sheltered accommodation. This has been the subject of a Private Members' Bill in 2008-09 and again in 2010. The *Care Homes and Sheltered Accommodation (Domestic Pets) Bill 2009-10* received its second reading in the House of Commons in March 2010. This bill was preceded in 2009 by the *Care Homes (Domestic Pets) Bill 2008-2009*. Although both Bills enjoyed cross party support, and a consensus in the house, based on the acknowledged health benefits of pets for the elderly, especially as an antidote to loneliness, the progress of the 2010 Bill was halted in its tracks by a general election. The Bill sought to create a legal presumption that pets (of an authorised, non-dangerous, species) would be permitted in care homes and sheltered accommodation for the elderly and disabled unless their exclusion could be justified, for example, the safety of the other residents necessitated an exclusion or the welfare needs of the pet could not be met in the care home. The Secretary of State for Health stated that,

“The Government understand and very much share the sentiment behind the Bill, and are sympathetic to its aims... We do not want there to be any ban on pets in care homes or sheltered housing. However, ... the parliamentary timetable will not allow the Bill to succeed” (Hansard, 5 March 2010).

The tone of this statement suggests a sympathetic response to a call for legislation in England to regulate ‘no pet’ covenants but that may not now be the case. Recent events in Scotland demonstrate the difficulties in persuading Parliament to enact legislation. In 2018 and 2019, the Scottish Parliament’s Public Petitions Committee considered public petition PE1706 to ‘*Introduce a law to allow pets in rented and supported accommodation*’. It subsequently closed the petition without further action on the basis that the Scottish Government and other stakeholders, including Shelter Scotland, felt that non-legislative measures were a more proportionate way to address the problem (Committee minutes, 21 November 2019). The committee did however raise concerns about possible links between homelessness and pet ownership and a week later a report by the Simon Community Scotland (commissioned by the Scottish Government) confirmed these concerns. The report demonstrates the strength of the human-dog bond for homeless people and recommends practices and policies for ensuring more pet-friendly housing for the homeless (Simon Community, 2019). The problem of pets and homelessness received recent attention in England (May, 2019) due to a campaign, following the suicide of John Chadwick, which led to Maidstone Borough Council adopting a new policy on ‘Pets in Temporary Accommodation’ (Maidstone Borough Council housing policy, 2018).

A number of countries have legislation regulating the use of ‘no pet’ covenants in residential leases, including, France, which passed legislation in the 1970s (Article 10 of the Law of 9 July 1970), Canada (Ontario) under its Residential Tenancies Act 2006 (Rook, 2018) and recently, Australia (Victoria) amended its housing law which came into force in March 2020 (Wahlquist, 2020). The fact that legislation already exists in European and Commonwealth countries is significant because it demonstrates how the problem of ‘no pet’ covenants can be addressed through legislative intervention.

1.2 My theoretical assumptions as a social constructionist

In recognising the importance of social theory for a qualitative researcher, I relate to O’Brien’s idea of the kaleidoscope.

“We can see social theory as a sort of kaleidoscope – by shifting theoretical perspective the world under investigation also changes shape” (1993, p. 10, quoted in Mason, 2002).

I have a social constructionist worldview so the shape of the world I investigate will differ to that of a positivist. Social Construction falls within the broader category of Post Modernism – a theory that is critical of central modernist ideas of reason, objectivity, prediction and scientific truth. I reject a realist epistemology and do not believe that there is one objective truth out there for me, as a researcher, to find and investigate. Instead, I believe there are multiple realities that are relative, context dependent and socially constructed. These ‘situational truths’ interest me as a researcher. Social Construction theory views reality as emerging from relationships. Things exist in the outside world, but their meanings are attributed by humans and constructed by language, which in itself is contextualised through a person’s culture and societal values (Gergen, 2015). A four-legged, furry creature with a tail exists and we can look at it and see it through our eyes and feel it with our sense of touch but what it ‘means’ i.e. the fact that it is called a dog and can live as a pet in our home, comes from our relationships with others. The dog becomes meaningful in our relationships; first, our relationships with other humans, where we learn what a dog is and second, through our relationship with the dog itself. We construct the dog’s meaning using traditions of construction, but these constructions can be many. What is a dog? For the owner it is one of the family; for the vet it is a source of income; for the scientist it is a subject for testing the effects of a new drug; for the blind person it is their eyes and for a deaf person it is their ears. No one reality is a true reflection of the world – there are multiple realities. A Social Construction approach is not just about studying subjective meanings but examines *how* people construct their behaviour in naturally occurring situations (Silverman, 2014). As such I seek to understand the interpretive *process* that happens when a person lives with a dog or cat in their home – *how* does the animal become a member of the family household? I am interested in the activities and everyday procedures that people use to make their experiences understandable.

Language is central to the constructionist theory. Language is not a picture reflecting reality but rather a ‘game’ (Wittgenstein, 1978 cited in Gergen, 2015) in which understandings of the world are achieved through people negotiating and agreeing on fluid meanings. This is especially significant in my research because I use terminology, in particular the word ‘family’ to make links between the human-companion animal relationship and housing law and policy. If pet-owning tenants use language based on the concept of family to try to explain their relationship with their dog or cat, does this have implications for housing law? If meanings of ‘family’ in everyday life are fluid and can change over time, does the law need to reflect this (bearing in mind that law is based on shared language and definitions)? We define dogs using language (for example, my property, my companion, my child) and over time this can develop into tradition and culture so that social convention declares our

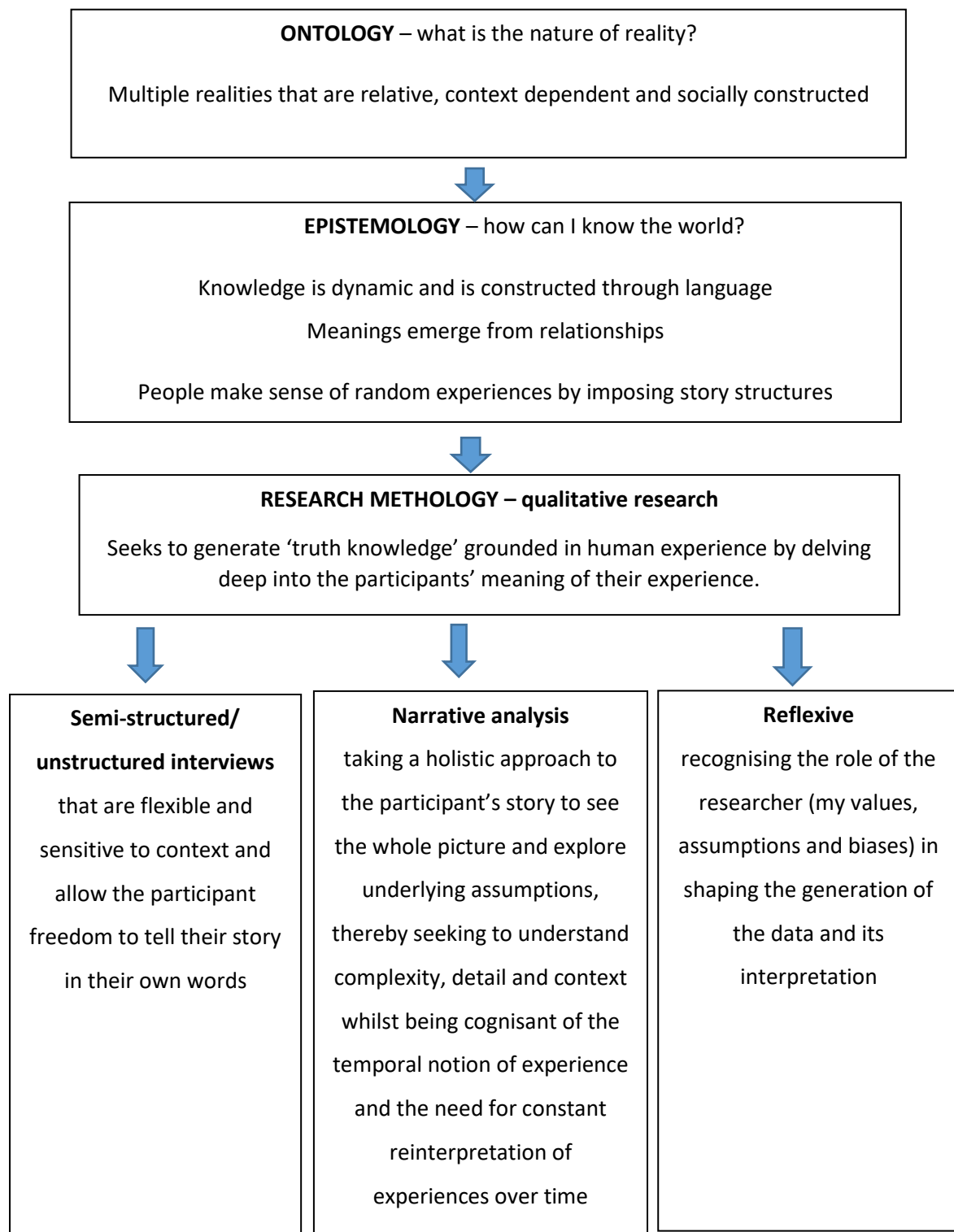
construction of the situation as more 'true' than any other construction. Therefore, words acquire a sense of being 'true' through continued use over a period of time within a community or group (Gergen, 2015). Garfinkel looked at the process of daily conversation as a means by which 'reality making' takes place (Garfinkel, 1967 cited in Gergen, 2015). Daily conversation between people is reliant on 'ethnomethods' – practices of talking and acting – that are used to create a taken-for-granted order. Garfinkel claims that we 'borrow' words from other contexts and although the word does not relate exactly to how we picture it, we make do. If we consider the terminology that people use in relation to their pet dogs, it is common for people to call themselves 'Mum' and 'Dad' when talking to the pet. The dog may be thought of as 'one of the family', and words such as 'my baby' or 'mummy's boy' are used to refer to the dog. These words are borrowed from the human family context. They do not fit perfectly because the dog is not a human child but nevertheless, we make do with the language we have. The choice of these words is significant to demonstrate a close bond between the human and the animal.

Social Constructionism does not seek objective 'truths' because,

"meanings are construed by human beings as they engage with the world they are interpreting" (Crotty, 1998, p. 43).

A pet-owning tenant's experience of 'no pet' covenants and the nature of the relationship with their pet are not 'truths' that exist out there waiting to be discovered. Instead, their experiences are dynamic and in recounting their stories to me, in a particular context and at a particular time, the reality of their experience is socially constructed. Thus, I believe that we cannot know the social world purely by measurement and quantification because meanings and understanding are dynamic and there are multiple interpretations of realities (Gergen, 2015). *Figure 1* shows how my theoretical assumptions affect my research design and the methodology I use which is described in more detailed in Portfolio component 2 *"Understanding my research methods and methodology"*.

Figure 1 - How my theoretical assumptions underpin my research design



1.3 My research aim, questions and methodology

The overarching aim of my research is to fill a significant gap in the legal literature by

- understanding the lived experience of ‘no pet’ covenants for pet-owning tenants in residential leases in the UK and
- critically analyse the current law around ‘no pet’ covenants in England with a view to evaluating any need for changes in housing law, policy and practice.

My preference is to use the term companion animal rather than pet as this better reflects the role of the animals in most people’s lives. I acknowledge that people keep animals for reasons other than companionship, for example, as a hobby. Bonas observes that “*Companion animals are therefore seen as a sub-set of pets*” (1998, p. 17). However, housing law and policy primarily uses the term ‘pet’ and in recognition of this I use the terms ‘companion animal’ and ‘pet’ interchangeably throughout my research. I use the word ‘owner’ rather than human ‘caretaker’ (Sanders, 2003; Fox and Ray, 2019) or ‘guardian’ (Favre, 2000) because this acknowledges the property status of pets in English law. People keep many different species as pets but in the UK the two most popular animals are dogs and cats (PFMA, 2019). In the context of ‘no pet’ covenants different issues may arise depending on whether a tenant is keeping a dog, a hamster, a snake or a goldfish so I have limited my research to the two most popular pet species, dogs and cats. These are also the species that are most likely to face opposition from landlords and neighbouring tenants due to the risk of property damage and/or nuisance (Battersea, 2018). My research is primarily focused on housing law in England, however, the social problem of ‘no pet’ covenants is not limited to England so it is helpful to make comparisons and analogies with Scotland as well as other countries (especially commonwealth countries).

The research questions to achieve my aim are as follows:

1. How do people in the UK construct companion animals as family members in everyday practices?
2. What do the stories of pet-owning tenants in the UK reveal about their lived experience of ‘no pet’ covenants?
3. How can the insights from these stories develop and enhance a deeper understanding of the harm ‘no pet’ covenants cause to tenants and companion animals? (Knowledge which can be used by those involved in residential lettings - landlords, letting agents, lawyers, courts).

4. If tenants perceive their cats and dogs as family members, can the human-companion animal relationship come within 'private life and family' under Article 8, European Convention on Human Rights?
5. In what ways, if any, does the existing law in England recognise and protect the human-companion animal relationship in the context of 'no pet' covenants in residential leases?
6. Is there a need for change in housing law, policy and practice to regulate the use of 'no pet' covenants in residential leases in England?

My research questions are answered, in part, by reference to five portfolio components, which include my relevant publications. In research question 1, I use the word 'family' tentatively, aware of its limitations just as others have done in the context of research on lesbian, gay and bisexual relationships. The rise of the LGBT community led to new forms of relationships and the concept of '*families we choose*' (Weston, 1991, cited in Westwood, 2013). In her article '*My Friends are my Family*', Westwood observes

"We simply do not as yet have a vocabulary to describe these new relationship forms" (2013, p. 348)

so she uses 'friendship' in her article whilst recognising its limitations. Similarly, with companion animals we can observe the strength of the relationship between an owner and their pet, one which many owners perceive as 'family' (Serpell, 1996; Franklin, 2006; Charles and Davies, 2008) for everyday living purposes, but acknowledge the limitations of labelling this relationship as family. This term is heavily laden with human associations and is not ideally suited for the unique relationship we share with companion animals but in the absence of alternative appropriate vocabulary, the terminology is borrowed. Westwood (2013) argues that for many people, particularly in later life, friendships can be the most significant relationships, more important than family relationships. Yet in key areas of law and social policy, such as welfare benefits and medical decision-making, friendship is not recognised by the law. She argues that the law needs to keep pace with changing relationship forms and considers how its failure to do so impacts on equality for older people. There are parallels here with the relationship people develop with their companion animal and the failure of the law to recognise this relationship in the key area of housing.

1.3.1 The co(a)gency of multispecies tenancies

The sociologist, Michael (2000) challenged some of the dichotomies through which we make sense of the world (such as human v non-human) and instead explored the complex process

of fabrication that occurs when new hybrid objects of study emerge out of relations between social, natural and technological actors. Michael suggests that

“Instead of humans and non-humans we are beginning to think about flows, movements, arrangements, relations. It is through such dynamics that the human (and non-human) emerges” (2000, p. 1).

I draw on Michael’s concept of the co(a)gent as a theoretical lens through which I can reimagine and define the parameters of my research subject. Michael seeks to show the connections between human, social, natural and technological actors. This heterogeneous ordering and disordering of the social world is a key feature of his concept of the co(a)gency. Michael explores how

“specific technologies, bits of bodies, aspects of nature, parts of culture and traditions of discourse come together to produce a co(a)gent” (2000, p.118).

In ‘*Narrating co(a)gents: the case of the Hudogledog*’, Michael considers a human walking their dog on a lead in a park. He argues that to understand the social and cultural interactions in the park, it is the hybrid (or co(a)gent) of the dog, the dog lead and the human that is relevant. He calls this hybrid the ‘Hudogledog’ to emphasise the distinctive nature of this entity as separate from its constituent parts and proposes that this hybrid should be studied, and not the objects acting separately. In focusing on the Hudogledog, Michael hopes to “*step past*” its component entities and the fundamental dichotomies we use to make sense of the social world – human/nonhuman, subject/object – and instead create a vocabulary that accommodates these divisions. He draws on Haraway’s feminist analysis of distributedness and heterogeneity. Heterogeneity is closely linked to the concept of ‘Distributedness’, the idea that what an entity is depends on what and how distributed entities and relations have come together. Haraway defined humans as “cyborgs” (Haraway, 1991) to illustrate how humans are caught in a network of natures and technologies that shape the co-construction of humans and animals. Michael uses the mundane technology of a dog-lead to question the dichotomies of human-nonhuman and subject-object in the human-dog dyad. Significantly, the dog-lead is a conduit of communication within the dyad that allows for the blurring of agency. Many people may see the dog-lead as a means for a dog owner to exercise agency and control the dog but the dog can also act as a social agent and use the lead to control the owner by pulling on the lead and taking the owner in another direction. In this way, the dog-lead serves as a channel of communication between the human and the dog that allows mutuality of action between them. Michael shows how treating co(a)gents seriously as objects of study can

“illuminate otherwise hidden pathways in heterogeneous ordering and disordering” (2000, 119).

I draw on Michael's concept of the co(a)gent to define the parameters of my research subject. If I consider my research participant, Julia, and her dog, Annie, they are living together in a flat that Julia leases from the local authority. As separate entities I have a human, an animal, a home and a lease but to understand the social problem of 'no pet' covenants in residential leases, it is the hybrid or co(a)gency of the human+animal+home+lease that is relevant – in a similar vein to Michael's Hudogledog, using the constructed phrase 'Huanihomse' emphasizes the distinctiveness of the multi-species tenancy as a separate entity. It is the liaison between these four entities that is relevant and not each entity on its own. Humans and animals and homes can all exist separately without any need to consider tenancies and leasehold covenants. A human can live in their own home with a companion animal without any concern for 'no pet' covenants. It is only where the four entities of human+animal+home+lease combine as a new hybrid, a Huanihomse, that 'no pet' covenants become relevant and problematic to pet owners. Using a hybrid as the research subject in this way aids thinking about how the entities come together and relate and their relative values. Michael shows how even such a trivial co(a)gent as the Hudogledog can have consequences and impact upon the actors. Michael uses the example of a scientist with a dog. We may have taken-for-granted assumptions about a scientist and perceive a scientist as an unproblematized unit of analysis but the Hudogledog shows complexity and illuminates otherwise hidden pathways. Similarly, we may have taken-for-granted assumptions about a good tenant which is seen as an unproblematized unit of analysis, for example, a good tenant is someone who does not deliberately breach a covenant in the lease, but through the Huanihomse the complexity of this taken-for-granted assumption emerges. My research participant, Kate, would consider herself a good tenant who always pays her rent on time and keeps the house in immaculate condition. To understand why she breached the 'no pet' covenant in the lease we need to consider the heterogeneous and distributed role of nature, culture and mundane technologies in the ordering and disordering of her everyday life as a pet-owning tenant living in a tenancy subject to a 'no pet' covenant. It is the interweaving of the human (landlord and tenant), nature (the companion animal), technology (house; arguably a lease) and culture (a lease clearly falls within culture as do 'no pet' covenants; pets as family is a cultural concept as is the legal construct of pets as property) that is relevant.

Therefore, the co(a)gent of a multi-species tenancy, a tenancy where humans and companion animals live in close spatial and emotional proximity, is the object of study in my research in understanding the effect of 'no pet' covenants on pet-owning tenants.

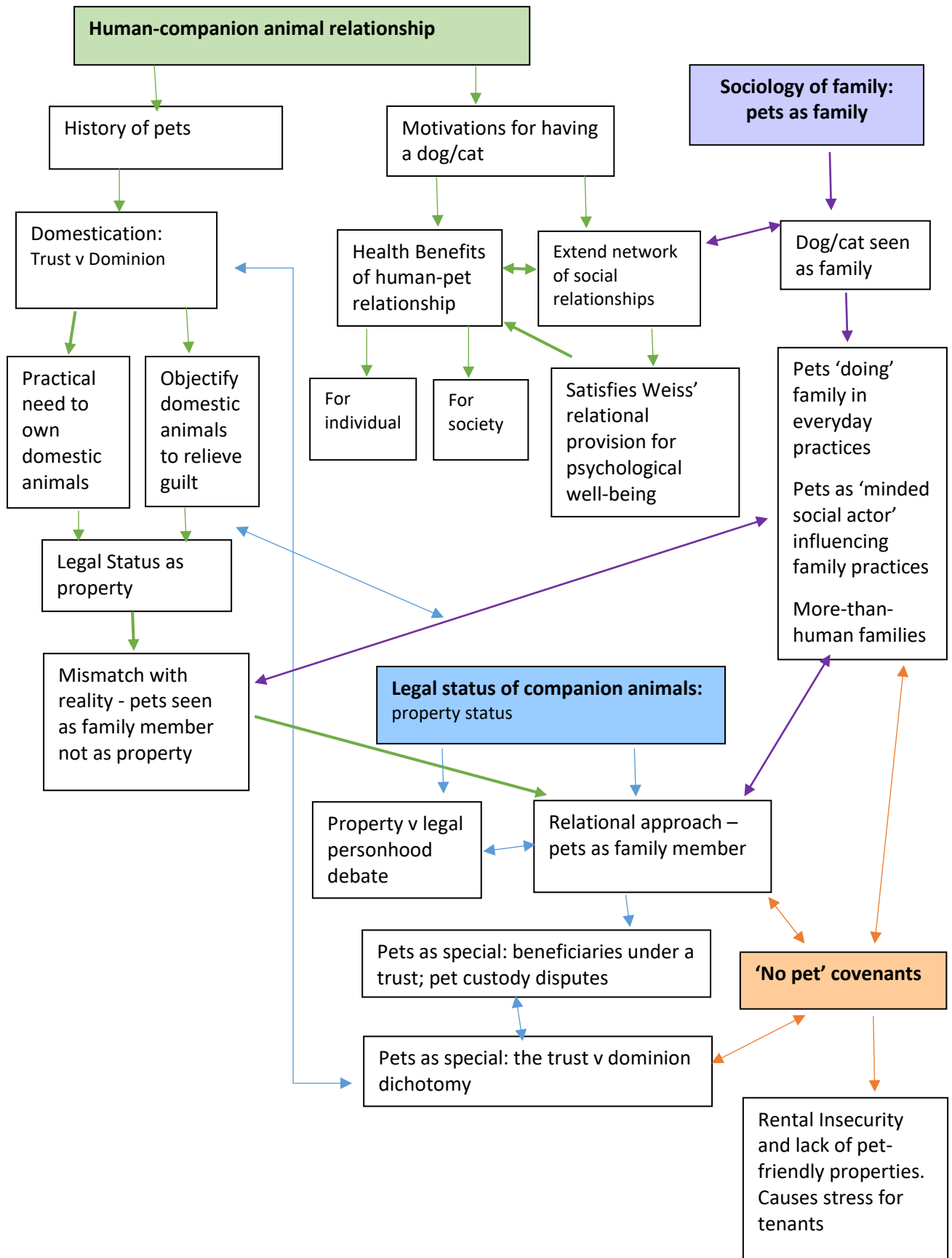
Adopting Michael's concept of the hybrid, Franklin argues that

“co(a)gency is operating in the constitution of contemporary homes, household and families” (2006, p. 147).

Our homes are heterogenous assemblages of humans, companion animals, technology and laws. Franklin observes how modern homes are changing as they become multispecies households. This can affect housing choice, housing design, types of furnishings and the use of space in the home. For example, housing choices are influenced by the needs of a companion animal to have a garden or be near a park that is good for dog walks. He suggests that the sociology of the family and the sociology of housing both need “*a new post-humanist makeover*” as neither are exclusively human domains and each are co-constructed by humans and companion animals (2006, p. 137).

For both Michael and Haraway, culture and history are a part of the heterogeneity that constitutes the human-dog dyad. This is significant for my research because the human-companion animal relationship entails a large body of historical, cultural and sociological literature which is relevant to understanding the hybrid of the multi-species tenancy, but to which I cannot hope to do justice. Michael says that in exploring the technologies of the dog-lead, the car and the TV remote control, his review of the literature must sacrifice depth to breadth because of the large quantity of literature relating to each entity. However, he argues that the limitations of his literature review do not make his efforts futile because his purpose is to show the connectivity of the literatures to one another. In a similar way my literature review illustrates the interconnectedness of the divergent bodies of literature on human-companion animal relations, pets as family, ‘no pet’ covenants and the legal status of companion animals (as demonstrated in figure 2 – *The interrelationship between the four areas of my literature review*).

Figure 2 - The interrelationship between the four areas of my literature review



Michael considers how culture (such as the literature on animals as subjects and objects) and legislation (such as the Dangerous Dogs Act 1991) fashion the human-dog dyad by making the dog-lead a significant part of the dyad. He argues that in studying dog-leads, he is simultaneously exploring cultural representations of animals, the relationship between humans and dogs, the environment, local government and the body. Similarly, multi-species tenancies are fashioned by history, culture and legislation relating to human-companion animal relations, concepts of family, the idea of home and private life, housing legislation and power relations between landlord and tenants. Multi-species tenancies are the bearers of this rich heterogeneity and distributedness. For this reason, sections 1.5 – 1.9 of my commentary review the literature on the nature of the human-companion animal relationship (exploring the history of the relationship, motivations for keeping pets and the nature of the socially supportive relationship); also the small body of literature on pets as family members within the wider context of the sociology of family (including shared traits with the parent-child relationship explored within the context of pet custody disputes); as well as provide a comprehensive review of the scant literature on ‘no pet’ covenants and give some consideration to the extensive literature on the legal status of companion animals. I may only review a fraction of the massive body of literature that surrounds the moral and legal status of companion animals but to exclude it altogether would be to lose sight of a key facet in the human-companion animal relationship. Just as Michael acknowledges the limitations of his diverse and expansive literature review and instead aims to show the connectivity of the literatures to each other, so too does my literature review emphasize the interrelationship of literatures. It is the entanglement of the diverse range of disciplines within multi-species tenancies that makes the flow and relations between them a key aspect of my research.

1.4 My original contribution to the field

My research goes further than the existing literature and my commentary and portfolio provide an original contribution to knowledge in the following ways:

- (i) When I commenced my research on ‘no pet’ covenants in 2017 there was no published research on ‘no pet’ covenants *and the law* in England. Since then there have been two articles (my article, Rook, 2018; Fox and Ray, 2019). Prior to 2018 the existing literature on ‘no pet’ covenants and the law were limited to the USA and Canada and their specific statutory provisions (Huss, 2005; Campbell, 2009; Palluzi, 2013). My research is the first study to critically analyse the law on the inclusion and enforcement of ‘no pet’ covenants in residential leases in England and to evaluate the need for new legislation. This constitutes

an original contribution to a neglected area of law that affects the lives of millions of tenants.

- (ii) There is very little existing academic literature on the effect of 'no pet' covenants on the lives of tenants in the UK. It is limited to my own article (Rook, 2018, Portfolio component 1, 2.1) and a recent publication by Fox and Ray, 2019. My DLaw research contributes the first empirical study of pet-owning tenants' lived experience of 'no pet' covenants in the UK. The existing literature is based on empirical studies in Australia (Power, 2017), Canada (Graham *et al*, 2018) and the USA (Carlisle *et al*, 2005). Fox and Ray are currently undertaking an empirical study on 'no pet' covenants in the UK but their study relates specifically to housing for older persons (Fox and Ray, 2019) whereas my research relates to tenants of all ages.
- (iii) While existing literature links the human-companion animal relationship with Art.8 ECHR (Fox and Westwood, 2017; Rook, 2018; Fox and Ray, 2019), one of my work's original contributions is the depth with which this link is considered. By critically engaging with the sociology of family, and theorising on how to define family using a function-based approach, my research is better able to inform the application of the human-companion animal relationship to Art.8 ECHR.
- (iv) There is existing empirical research on 'pets as family' (Franklin, 2006; Power, 2008; Charles and Davies, 2008) and there is existing empirical research on the effect of 'no pet' covenants (Power, 2017; Graham *et al*, 2018). My research is original because it combines these two related areas into one empirical study that questions the research participants on both the character of their relationship with their companion animals and their lived experience of 'no pet' covenants. Drawing on Michael's (2000) concept of the co(agency), I study the hybrid or assemblage of human+animal+home+lease. This is an original aspect of my research and acknowledges that only by understanding the character of the human-companion animal relationship and the strength of the bond, can the full impact of 'no pet' covenants on tenants and companion animals be appreciated.
- (v) My research gives a voice to a group of people that the law has previously largely ignored: pet-owning tenants. This in itself is an original contribution to the field.
- (vi) Given the extensive use of stories in the law (clients telling lawyers their story and lawyers using stories to explain the events to the courts) it is surprising that narrative analysis has rarely been used in legal research in housing law. Stories are an extremely valuable resource for understanding meanings and relationships and I believe these are the relevant ontological properties of the social world for socio-legal research. That my research uses narrative analysis to

craft and analyse four narratives of pet-owning tenants in the UK provides a valuable contribution to legal research.

Ultimately my research (both the critical commentary and the Portfolio components) provides a theoretical approach to critically analyse the use of 'no pet' covenants through the lens of harm. For landlords, letting agents and the courts my research offers a detailed understanding of the character and magnitude of harm caused to pet-owning tenants by 'no pet' covenants. For Parliament, my work offers a framework, based on a Harm Assessment (drawing on the work of Feinberg in criminal law and applied here by analogy), through which to balance the disparate rights of all those affected by 'no pet' covenants – landlords, tenants, companion animals and wider society – and thereby assess the need for new legislation.

1.5 The nature of the human-companion animal relationship

The subject of the human-animal relationship is essentially a painful one and

“has been systemically evaded by our whole culture, because it makes fearful trouble” (Midgley, 1994, p. 190).

Our relationship with animals is plagued by conflict, contradictions and anomalies. It is not surprising then that the scholarly discipline of human-animal studies (HAS), which studies the interactions and relationships between human and nonhuman animals, has only emerged in the last twenty years (DeMello, 2012). HAS seeks to understand how animals are socially constructed. Once an animal is incorporated into the human social world, it is assigned a category, usually based on how it is used by humans. This social category is more important than the biology of the animal in determining the status and treatment of the animal both morally and legally (Fox, 2004). For example, a rabbit's biology classifies it as a member of the species *Oryctolagus cuniculus*, but the treatment of the rabbit under English Law depends upon its use: is it a pet rabbit? (protected by the Animal Welfare Act 2006 (AWA 2006)); or a rabbit bred for meat? (in which case the Welfare of Farmed Animals (England) Regulations 2007 also apply); or is it a rabbit used in scientific procedures as an experimental test subject? (which would exclude the AWA 2006 and instead apply the Animals (Scientific Procedures) Act 1986); or is it a wild rabbit? (which is deemed a pest and generally excluded from the protection of the law unless under the permanent or temporary control of a person). Consequently, it is the social category bestowed upon the rabbit that determines its treatment under the law. As DeMello observes,

“Animals’ physical identity is less important to their status and treatment than their symbolic identification and their social meaning” (2012, p. 10).

A dog can transition from a cherished companion and family member to a stray if an elderly owner is forced to relinquish their pet when moving into a residential home (Fox and Ray, 2019) and in this act the dog loses the protection of s.9, AWA 2006 of having someone responsible for meeting his/her welfare needs.

DeMello (2012) uses the spatial distribution of animals as a means of understanding how we incorporate animals into our society. In this way, pets are those animals that have been incorporated into the human domestic space, our homes. The link between homes and pets is vital, however, this may be too wide a definition as not all animals living in the domestic space may be seen as pets. Working dogs may spend time in the home but are mainly kept to work and contribute economically. According to Serpell and Paul,

“The word pet is generally applied to animals that are kept primarily for social or emotional reasons rather than economic purposes” (1994, p. 129)

and it is to these animals that my research relates.

Two key themes arose in my literature review of the human-animal relationship - conflict and social construction. Firstly, the conflicts and contradictions that underpin the human relationship with animals, arising from our desire to use animals as utilitarian objects whilst simultaneously recognising them as sentient beings. I traced the history of this conflict and explored the defence mechanisms and coping strategies developed over time to defuse or hide the conflict and assuage any feelings of guilt or discomfort. This is important in understanding the origins of the current legal status of domestic animals as property (Francione, 1995) and the ambivalent attitude towards animals (Serpell, 1996; Irvine and Cilia, 2017). The second theme is the social construction of animals whereby the biology of the animal is less important than its allocated social category when assessing the human treatment of the animal and the legal protection it enjoys. This is especially evident with companion animals.

1.5.1 The history of the human-pet relationship: defusing conflict

The origin of the legal status of animals as property is thought to lie in the domestication of animals and the move from hunter-gatherers to pastoralists. The beginnings of livestock husbandry is dated approximately 9000 years ago starting with sheep and goats (Clutton-Brock, 1994) but our relationship with dogs is much older. The conventional view is that humans first domesticated their hunting partner, wild wolves, 10-20,000 years ago (Davis and Valla, 1978; Beck and Katcher, 1996), however some suggest that it was much earlier, approximately 100,000 years ago (Morell, 1997). Using selective breeding to encourage the characteristics we desired - playfulness, subservience, dependence – dogs are the creation of humans. Beck and Katcher suggest that,

"Our affection for dogs may simply be a way of expressing the love that a creator has for his or her creation" (1996, p. 171).

They hypothesize that

"the relationship between dogs and people is rooted in the evolution of both" (1996, p. 176).

Given the long history we have with dogs it is not surprising that dogs are the most popular pet in the UK (PFMA, 2019). The first evidence that a dog may have been a pet was found in Israel in 1978. A grave contained two skeletons buried together 12,000 years ago: an elderly human and a 5-month old domestic dog. The person presiding over the burial had

"carefully arranged the dead person's left hand so that it rested, in a timeless and eloquent gesture of attachment, on the puppy's shoulder" (Davis and Valla, 1978, p. 609).

Studies of pets in primitive societies hint at a significant paradigm shift as humans progressed from hunter-gatherers to agriculturists. Ingold (1994) adopted an 'indigenous perspective' to understand our domestication of wild animals. He sought to shed the dichotomies of 'wild versus domestic' and 'nature versus humanity' traditionally used in the West to tell the story of the history of our relationship with animals, and instead sought to understand the nature of the relationship between hunter-gatherers and animals from the perspective of the indigenous people themselves. From their perspective, the natural world is not separate from, and inferior to, the human world. It does not have to be conquered or controlled. Instead, animals are fellow inhabitants of the same world as humans. Serpell (2000) observes that there is much consistency in how hunter-gatherer societies view animals as rational, sentient and intelligent beings with spirits or souls that can survive the body after death. For example, the Cree Indians of Northern Canada believe that animals intentionally present themselves to the hunter to be killed and on death the soul of the animal is released to become flesh again (Ingold 1994; Tanner 1979 cited in Serpell, 1996). The hunter must be respectful and not wasteful, or the animal will remember the transgression and not present itself in the future. This means that the success of the hunter depends on establishing a continuing relationship with the animals. A relationship, Ingold advocates, based on trust. For him,

"The essence of trust is a peculiar combination of autonomy and dependency" (1994, p. 13).

The hunter is dependent on the animal and takes a risk that the animal, as an autonomous being, will act in the interests of the hunter and present itself to be killed. In return, the hunter is respectful of the animal. However, this egalitarian moral ideology was clearly incompatible with the shift to agriculture and the domestication of farm animals for meat. According to Ingold the relationship the pastoralist has with animals is based on domination not trust. The

animals are selectively bred to be dependent on humans and therefore are unable to exercise their own free will to present themselves to die. The animals have no control over their lives. This significant change created a moral dilemma for early farmers and Serpell suggests that coping strategies were developed,

“but perhaps the most pervasive and durable was the idea that humans are both morally separate from and superior to all other animals” (2000, p. 116).

Serpell agrees with Ingold (1994) that the

“ideological difference between hunters and herdsman primarily involves a shift from human-animals relations based on trust to those based on domination” (2000, p. 116).

This shift necessitated seeing animals as objects as opposed to subjects worthy of respect. Ingold argues that,

“Domestication can be said to exist when living animals are integrated as objects into the socio-economic organisation of the human group” (1994, p. 6).

Thus, the advent of domestication of animals was dependent not just on biology but also on culture. Biology enabled us to adopt artificial selective breeding techniques to modify animals into what we wanted, and culture enabled us to own the animals as property through the development of law and government.

Arluke (1994) has explored the conflict in the treatment of animals in contemporary society – the fact that we shower our pets with love and treat them as one of the family but exploit and kill other domestic animals as utilitarian objects. He observes that,

“As with any cultural contradiction, these attitudes are built into the normative order, itself perpetuated by institutions that provide ways out of contradictions by supplying myths to bridge them and techniques to assuage troubled feelings” (1994, p. 145).

Thus, our legal institutions, that objectify domestic animals as property on a par with inanimate things, serve to justify our use of animals, especially the animals we eat, and relieve any associated guilt. Arluke used interviews with animal shelter workers to understand how they developed coping strategies to maintain an identity as an ‘animal person’ and ‘pet lover’ while simultaneously having to euthanize healthy but unwanted animals at the shelter often of the same species as their pet. In a similar way, but on a much larger scale, the legal status of animals as property may be seen as a societal coping strategy to defuse the conflict we feel in exploiting sentient beings especially farm animals.

Erikson (2000) studied the social significance of pet-keeping among Amazonian Indians for whom the concept of reciprocity is vitally important. He argues that pet keeping is a strategy for coping with the imbalance in reciprocity caused by hunting. Unlike modern Western society, pets and hunted animals usually belong to the same species but most Amazonians

do not eat their pets. Caring for pets, especially the young of a killed prey, can be seen to cancel out the destructive effects of hunting. Rather than being seen as a first step towards domestication of animals for food, Erikson suggests that pet-keeping demonstrates a continued allegiance to hunting as a way of life. This is an interesting idea but only applies where a society holds the concept of reciprocity dear. This concept had little relevance in the highly stratified systems of Western Europe. Ancient Greek philosophy, and especially the work of Aristotle, was influential in emphasising the idea of animals as inferior to humans and existing to serve them. Aristotle was one of many views about our relationship with animals in the ancient world, for example, Pythagoreans were vegetarian believing that animals had souls (Kelch, 2012). However, early Christianity adopted Aristotle's version of the debate and this view was transmitted through the writings of St. Augustine and became the accepted view in the West (Brooman and Legge, 1997). In Medieval times the church in Europe enjoyed a powerful position and it had an open aversion to pet-keeping (Thomas, 1983). In fact, all monotheistic religions, not just Christianity, recognise humans as being superior to animals. Therefore, the move to domesticated farm animals and agriculture, together with Ancient Greek philosophy and major religious teachings all promoted the concept of the supremacy of humans over animals. From this background Menache asks,

"When and how did Medieval people abandon their comfortable status of absolute ruler over nature – which was accorded to them by divine will – and, exercising their free choice and acting in open defiance of theological tenets, place themselves close to dogs, to the point that they turned canines into their 'best friends'?" (2000, p. 45).

Menache argues that hunting in the late Middle Ages was an important step in the evolution of keeping dogs as pets. She identifies the 'ennoblement' of hunting that differentiated the nobility from the lower classes, as a key influence. Laws were used to restrict hunting and the ownership of hunting dogs to the nobility, for example, in 1066 the Council at Winchester made it a crime for commoners to keep greyhounds. Hunting was linked to the noble virtues of courage and bravery. Menache suggests that,

"This new social meaning created a solid basis for a fresh approach to dogs, especially hunting dogs, which were transformed into a symbol of the knightly class. When this transition was made, dogs began to be treated with tenderness, devotion, one may say even brotherhood" (2000, p. 52).

However, the concept of pet keeping suffered a significant setback in England during the 16th and 17th centuries when witchcraft hunts made keeping pets dangerous. Legislation was passed in England creating the crime of 'necromancy' and the concept of a witch's familiar (in the form of animals, usually cats and dogs) was introduced (Hole, 1977 cited in Serpell and Paul, 1994). Serpell and Paul observe,

"it was claimed that people were debased or dehumanized by the act of co-habiting on such egalitarian and intimate terms with animals, especially since the animals in

such relationships often tended to be elevated to the status of persons” (1994, p. 134).

A relationship with domestic animals based on domination and superiority was acceptable, for example, working horses or pigs kept for meat, but a relationship with a domestic animal such as a cat based on trust and equality was perceived as dangerous and consequently demonised.

Religious authorities discouraged people from keeping pets and up until the 18th century there were few pets except amongst the nobility (Serpell, 1996). However, England underwent a transformation of its human-animal relationship in the 19th century. It went from being a nation that normalised visible cruelty to animals in popular forms of mass entertainment like bull baiting, dog fighting and cock-fighting, to being a nation of animal lovers initiating the first major piece of animal welfare legislation in the world (An Act to Prevent the Cruel and Improper Treatment of Horses and Cattle 1822) and creating The Society for the Prevention of Cruelty to Animals (later to become the RSPCA due to Royal patronage) in 1824 to fund the enforcement of this new law. Ritvo's (1994) analysis of attitudes to animals in 19th century England highlights the difficulty of seeking to understand human-animal relations using a single narrative. Even today, there is much complexity and diversity in our attitudes to animals including companion animals. Blouin's (2013) typology of orientations towards pet dogs (humanistic, dominionistic and protectionistic) demonstrates the wide variations in people's attitudes to dogs from the humanistic owner who treats their dog like a human, usually a child, to the dominionistic owner who adopts a hierarchical approach to their dog. Such differences are evident in contemporary England where some pet owners construct their dogs as “*fur babies*” fuelling the marketing of expensive life style accessories and dog care services (Fox, 2010, p. 42) while others inflict cruelty on their pets as evidenced by the RSPCA securing 1,341 convictions for cruelty under the Animal Welfare Act 2006 in 2019 (RSPCA Annual Report, 2019, p.30).

1.5.2 Understanding the motivations for keeping pets

There are many disadvantages of pet ownership including: the significant financial costs of food, veterinary care and insurance; time spent caring for the pet which can be significant for dogs who need to be walked at least twice a day; cleaning up after the pet; concern arising from the destructive or anti-social behaviour of pets; emotional distress when the pet is ill or dies; risks of bites, allergic reactions or other illnesses carried by the pet (Plaut, Zimmerman and Goldstein, 1996) meaning pets can be a source of stress (Connell et al, 2007). Pets usually provide no economic benefit, so given the significant disadvantages associated with pet-keeping, what motivates people to acquire a pet and what does this tell us about the nature of the human-companion animal relationship?

1.5.2.1 *Developing social relationships*

There is support for the view that obtaining a pet provides an opportunity to form a new social relationship and is a means of extending a person's network of relationships. Harker, Collis and McNicholas (2000) applied Weiss' theory of relational provisions to understand motivations for acquiring a pet. Weiss (1974) identified six categories of relational provision that ensure a person has an adequate social life and sense of well-being: Attachment; Social integration; Opportunity for nurturance; Reassurance of worth; a sense of Reliable alliance and Obtaining of guidance. Weiss advocated that individuals need to maintain a number of different social relationships to ensure all the relational provisions are met. Harker, Collis and McNicholas (2000) used a pet ownership questionnaire to examine Network of Relationship Inventory ratings from two groups of adults: those who were seeking to obtain a pet and those who were not. The study found that participants seeking to acquire a pet had expectations of positive relationship-like provisions - such as companionship, friendship, affection – which they believed would result from keeping a companion animal. This suggests that people acquire a pet in order to extend their network of relationships. However, what is the motivation to extend the network? Could pets be compensating for inadequacies in human-human relationships? Bonas, McNicholas and Collis (2000) used a similar type of survey (based on the Network of Relationships Inventory and Weiss' theory of relational provisions) and found no evidence to support the idea that pets are used to '*plug the gap*' where social provisions are lacking in human-human relationships. Harker, Collis and McNicholas (2000) suggest that those who are socially isolated are more likely to own a pet but this does not appear to be supported by the reality of pet ownership as figures indicate there are higher frequencies of owning pets among couples and families with children, than single or elderly people (Serpell, 1996). This may be for practical reasons, for example, single people may have less money and smaller accommodation. There is considerable support for the view that pets do not just substitute human relationships but complement and augment them (Serpell, 1996; Beck and Katcher, 1996).

Bonas, McNicholas and Collis' (2000) study to investigate whether pet ownership can be usefully conceptualized as a social relationship gathered data on the participant's relationship with their immediate human family as well as their relationship with their pets so that the data between the human-human relationship and human-companion animal relationship could be compared. They found striking similarities in the nature of the relationships which adds

“empirical weight to the view that human-pet relationships are similar in nature to human-human relationships and, perhaps more specifically, that the supportive aspects of the two kinds of relationships are broadly similar” (2000, p. 219).

Although the general social supportive aspects are similar, the human-dog relationship gave higher scores for the attachment, nurturance and reliable alliance sub-scales of Weiss' social support index than human-human relationships where the scores were higher for instrumental aid, affection and admiration indicating a subtle distinction in the needs met by companion dogs compared to those met by fellow humans. Weiss advocated that individuals need a range of different social relationships for their well-being and it appears that relationships with companion animals can play a valuable role in contributing to this variety.

Other similar studies have focussed on specific population groups. For example, one study which examined the bond between the elderly and their pets identified the most important social provision derived from the relationship as '*attachment, emotional closeness*', followed by the '*opportunity for nurturance*' and '*reassurance of worth*' (Enders-Slegers, 2000).

Another study which examined the human-pet relationship amongst people living with HIV in Australia demonstrated that pets benefit the emotional, physical and social life of their HIV owner (Hutton, 2015). That pets fulfil one or more of Weiss' six relational provisions for psychological well-being is especially important for vulnerable groups such as the elderly (Enders-Slegers, 2000; McNicholas and Murray, 2005), women suffering domestic abuse (Flynn, 2000; Fitzgerald, 2007) and homeless people (Irvine, 2013a; Carr 2016). Irvine's study of homeless pet owners in the USA identified four dominant narrative themes: the companion animal as 'friend and family'; 'Pack of Two' (in which the animal is described as meaning "*everything*"); animal as 'Protector' and finally animal as 'Life Changer and Life Saver' (2013a, p. 87). In these ways the animals are constructed as respected significant others who bestow a sense of self-worth, provide a buffer against isolation and in some instances become redemptive figures who keep their owners alive or turn their lives around (Irvine, 2013a).

These studies suggest that it is the social relationship with the companion animal that motivates people to acquire a pet and in anticipation of enjoying positive relationship-like benefits, such as companionship, they tolerate the expense, time and inconveniences of living with a companion animal.

1.5.2.2 The health benefits of the human-companion animal relationship

Since Friedmann *et al*'s ground breaking research in 1980 that discovered that pet owners had better survival and recovery rates one year after discharge from a coronary unit than non-pet owners (Friedmann *et al*, 1980), there have been many studies attempting to measure the effects of pet ownership on health (Serpell, 1991; Anderson, Reid and Jennings, 1992; Friedmann, Thomas and Eddy, 2000; Allen, 2003; McNicholas *et al*, 2005; Wells, 2009; Freidmann *et al*, 2013). A recent example comes from a comprehensive study

in Sweden, involving 3.4 million people over a 12-year period, which found that owning a dog lowered the risk of dying from cardiovascular disease, especially for single people (Mubanga *et al*, 2017). The authors suggest that it is the relationship people have with their pets, and the social support that emanates from this close bond, that is significant to any physiological and psychological health benefits. This growing body of research is relevant to wider society and not just to the individuals affected. It is estimated that the health benefits of pet ownership in the UK may save the National Health Service up to £2.45 billion per year (Hall *et al*, 2017), for example, through reduced visits to the doctor (Siegel, 1990).

In contrast to this body of research, Herzog observes that those studies in which pet owners have been found to be more likely to have specified health *problems*, have been little publicised thereby over-inflating the actual significance of what he calls “*the pet effect*” which is at best inconclusive (Herzog, 2011). However, if it is the *relationship* people have with their pet that is significant to any health benefits, mere pet ownership alone is not sufficient to test the validity of the claim that pets bring health benefits to their owners; the strength of the bond between the owner and the companion animal, as perceived by the owner, also needs to play into the equation. Hutton argues that it is the owner’s perception of support that matters,

“a person’s *belief* in their animal’s supportive presence may be sufficient to “buffer” negative life challenges” (2015, p. 211).

Someone who owns a pet but has a distant, functional relationship with the animal is unlikely to reap any health benefits that come from a close human-companion animal relationship. According to Beck and Katcher

“*It is possible that pet animals can protect our health and sustain our emotional balance because we treat them like people*” (1996, p. 10).

Siegel suggests that it would be more useful for researchers to focus on understanding the circumstances in which the human-pet relationship may facilitate health benefits rather than examining whether benefits exist *per se* (Siegel, 2011). Therefore, the evidence that the human-companion animal relationship provides physical, mental, emotional and social benefits to individuals is strong but even where the strength of the medical evidence is disputed (Herzog, 2011), the individual pet-owner’s perception of the benefits remains significant.

The socially supportive nature of the human-companion animal relationship and the health benefits arising from this are significant contributory factors in advocating that the relationship ought to be recognised as familial in English housing law, policy and practice.

1.6 The sociology of family: pets as family members

1.6.1 My theoretical assumptions on constructing 'family'

Defining family membership is infused with complexity and controversy. There is a set of relationships based on blood ties, such as mother and child, and recognised legal ties, such as husband and wife, where there is consensus; but beyond these formal categories there is uncertainty. In recent decades there has been a move away from defining family as a heterosexual conjugal unit based on marriage and co-residence engaged in raising children (the traditional nuclear family) towards embracing the diversity of families, for example, single-parent families, homosexual families and families living across households. In some cases, familial relationships may be based on religious or moral ties. This diversity is not a decline or disintegration of family but simply a change to reflect evolving patterns in society such as shifting gender relations and sexual orientations (Silva and Smart, 1999). Silva and Smart observe,

“the family is not expected to remain unchanged and unchanging. It is seen as transforming itself in relation to wider social trends and sometimes it is seen as a source of change itself which prompts changes to occur in public policy” (1999, p.1).

This model of family advocates the need for fluidity and change in family arrangements to be taken seriously and supported by appropriate policy and law (Morgan, 1996; Silva and Smart, 1999). There is extensive research to show that many people consider their companion animals as family members (Cain, 1983; Fox, 2006; Franklin, 2006; Charles and Davies, 2008; Power, 2008; Shir-Vertesh, 2012; Irvine and Cilia, 2017) and my own findings from my interview data support this. If wider social trends show the diversity of family to have crossed the species boundary to incorporate companion animals, then what are the implications for the use of 'no pet' covenants in multi-species tenancies? If pet-owning tenants are increasingly treating their companion animals as family members could this be the “*source of change*” Silva and Smart refer to that prompts changes in housing policy, practice and law?

Research carried out in Wales at the start of the twenty-first century on family formation and kinship networks demonstrates this complexity in defining family. Some of the research participants continued to define family using traditional categories of blood relations, marriage or adoption, while others took an alternative approach basing it on the quality of the relationship and support offered and received by others (Charles and Davies, 2008). This shift from blood and marriage ties to a focus on the “*subjective meaning of intimate connections*” is a “*major change*” in the concept of family (Silva and Smart, 1999, p.7).

Research on step-kin demonstrates the way in which feelings and emotions towards individuals can be more significant in defining who is a family member than blood or legal links (Bornat *et al*, 1999). The “*Cultural Construction of Kinship*” emerged as a key theme from the Welsh research data (Charles and Davies, 2008, p. 9.1). However, within the context of the changing definition of family, the core functions of caring, loving and responsibility remain constant. In this way the functions of a family (what it does in practice) is intrinsically linked to what a family is. For some scholars the central function of a family is caring,

“For me, ‘family’ is one way to describe forms or expressions of intimate or private living based upon care and interdependence” (Diduck, 2011, p. 289).

This cultural construction of kinship through caring practices is significant to the idea of pets as family; if family is socially constructed, and is defined by its functions, the species barrier may be crossed because caring is a function that can readily be applied to pets as both care-receivers and care-givers (Irvine, 2013a; 2013b).

The literature provides a wealth of examples, across countries, of pets being constructed as family members. For example, a nation-wide survey in Australia that specifically focused on the human-animal relationship found that 88% of pet owners think of their companion animals as members of their family (Franklin, 2006) and similar findings exist in the USA (Cain, 1985; Carlisle-Frank, 2005). The study on families and kinship networks in Wales found that many interviewees spontaneously included their pets as part of their kinship networks (Charles and Davies, 2008). Since these interviews were not designed to ask about pets, the authors felt confident that the findings were robust and unaffected by any preconceptions of family membership on the part of the interviewers. A qualitative study in Australia involving twenty-two new dog owners found that all but one described their dogs as family members (Power, 2008, p. 539) and a study on pet-ownership in Britain found that many of the participants viewed their pets as immediate family (Fox, 2006, p. 532).

While there is evidence that people perceive their pets as family members, it is less certain what ‘being family’ means in this context and whether there is a straightforward equivalence to human family (Charles, 2014). Bonas, McNicholas and Collis suggest that we borrow terminology from human-human relationships because we lack specific terminology to categorise the relationship,

“if we had evolved new processes to deal with human-pet relationships, it would be likely that we would have also developed a different vocabulary to distinguish them” (2000, p. 211).

This may be true, but the word ‘family’ is infused with cultural and symbolic meaning that makes it difficult to ignore. Although marginalised groups such as same-sex couples were

initially denied official recognition as family, they nevertheless deployed the language of family within the LGBT community and created 'families of choice' (Weston, 1991; Weeks, Donovan and Heaphy, 1999). That the concept of family was stretched to include arrangements such as step-children, sperm donors and homosexual partners rather than creating a new vocabulary for these relationships (Silva and Smart, 1999), demonstrates the elasticity of the concept to reflect changes in societal attitudes to new relationships. People anthropomorphise companion animals by endowing them with human qualities (Fox, 2006) and use vocabulary from human-human social relationships such as 'family member' (Voith, 1985) and 'surrogate child' (Sanders, 1990). The majority of participants in Power's study of new dog owners described their dogs as 'children' but Power argues this is not "*naïve anthropomorphism*" but functioned to

"emphasise the intensive nature of the relationship" (2008, p. 541).

That owners self-identify their pets as family members demonstrates their perception of the character and significance of the human-companion animal relationship. In recognising this "*hybridization of the family*", Franklin observes that this is "*not a one-way human-orchestrated attribution*" but rather a two-way process with the animals themselves contributing to the construction (2006, p. 142). In thinking about people and their dogs, Haraway (2003) prefers the word '*relatings*' which recognises the fluid character of the human-companion animal relationship. Significantly, '*relatings*' acknowledges a more symmetrical pattern of agency between humans and companion animals in which animals play an active part. Haraway states

"Dogs are about the inescapable, contradictory story of relationships – co-constitutive relationships in which none of the partners pre-exist the relating, and the relating is never done once and for all" (2003, p. 12).

My research participant, Julia, lived with her dog Annie for over 11 years. The relating that existed between them developed over that 11-year period, it was not static and fixed, nor did it exist before Julia took Annie into her life. Both were altered by the experience of their co-habitation. Franklin expresses these relatings with companion animals as having

"an open-ended experimental becoming rather than a fixed, behaviourally given and limited nature" (2006, p. 145).

The literature identifies a number of contrasting and overlapping models for understanding how pets come to be recognised as family members (Fox, 2006; Power, 2008; Shir-Vertesh, 2012). Fox (2006) looks more generally at the ways that pet owners come to understand their pets in everyday life and does not specifically focus on pets as family members, nevertheless her findings of two contradictory models existing side by side with pets seen as both 'human' (the anthropomorphic model) and 'animal' (the animal instinct model) provide

valuable insights. Under the 'animal instinct' model people try to understand their pets through popular animal psychology, based on studies of 'natural' animal behaviours in their ancestors in the wild. In this way pet owners see, and react to, their animals as animals rather than as little humans, but sometimes this approach can underplay the agency and autonomy of the individual animal by essentializing behaviour as pure instinct. At other times, the pet owners recognise the individual personality of the animal as a subjective being and attribute human-like intentions and emotions to them such as disappointment or jealousy. This use of anthropomorphism gives the animals a more active role in the human-companion animal relationship. Fox found that pet owners can switch between the animal instinct model and anthropomorphic model in their relations with their pets.

Anthropomorphism is often criticised in the literature on animals as it is seen as unscientific to give animals human-like characteristics (Serpell, 1996). However, Fox challenges this view in a post-humanist world,

"If the aim of post-humanism is to destabilize the categories of 'human' and 'animal' themselves, seeing these as interconnected and made up of a complex network of associations, then the problematic nature of 'anthropomorphic' interpretations is also questioned, because particular qualities can no longer be seen as distinctly human" (2006, p. 532).

In a post-humanist world jealousy is not specifically a human trait.

Power's (2008) research was specifically about pets as family and focused on the way in which 'more-than-human' families are co-constituted through everyday practices in the home. From her interviews with people who had recently acquired a dog, she identifies three themes: Caring; Rules and Behaviours; Dog Agency and from these themes she deduces three models of human-companion dog relationship: Parent-Child, Pack and the 'Agency of Animal' model. In the Parent-Child model participants responded to the care needs of their dogs and perceived them as child-like. In the Pack model participants emphasized the importance of creating and maintaining behavioural rules, such as restricted access to parts of the house or furniture, to establish dominance, set boundaries and help dogs understand their role in the pack. In some respects, this is similar to boundary setting rules parents establish for their children so overlaps with the parent-child model but is distinct as the parent-child model is based on human-provided care relations. Pack relations exist as an interaction between humans and dogs-as-a-species, however, the Agency of the Animal model, developed from the 'dog agency' theme, involves a more individual engagement with a specific dog. In this model, the human and dog are both active partners in shaping family and everyday routines.

Power's "Pack" model is a reconceptualization of the family as a pack similar to a pack of wolves. This model emphasises a dominance/submission hierarchical relationship with the human adopting the role of the leader of the pack (something that Fox also witnessed in her research of British pet owners and was acknowledged in her "*animal instinct model*", 2006, p. 530). This pack relation is performed in everyday life through the owner's hierarchical coding of the home spaces and furnishings, for example, restricting the dog's access to certain rooms or items of furniture such as the sofa. Under this model owners assert the importance of treating the dogs as dogs and trying to view family relations as they think a dog would. This model was prevalent in Power's data which was not surprising given that many of the research participants were new dog owners and were recruited from a dog training class which taught 'pack' dominance techniques for training the dogs but proved to have little relevance to my participants (see Portfolio component, 2, 3.5).

Power's "Agency of animal" model proved most relevant to my research participants. This model recognises how the family is shaped by the agency and activity of the dog. Charles and Davies (2008) also found evidence of animal agency in social relationships between owners and their pets and identified this as a key theme in their research. In both their research and Power's, the perceived needs and preferences of the dogs were incorporated into the family routines by the owners. At other times the dogs themselves asserted their own activities, for example, instigating games that took their owners out of their own activities forcing them to engage in an activity they did not initiate nor control. Recognising the dogs as social agents, Power observes,

"Here dogs were not just 'little hairy people' that needed to fit within existing routines, but instead participants' plans and activities were altered and extended to incorporate the needs, preferences and pleasures of dogs. In these ways dogs began defining their own role within the family and shaped the rules and practices of family living" (2008, p. 549).

Power notes how in practice her three models of understanding relationships with companion animals as family are complex and entangled. Taken together the models indicate two approaches to multi-species families that are simultaneous and conflicting. Firstly, a humanist approach of shaping and moulding the dog to fit within the pre-existing human family and owner expectations of how the dog should behave in the home. Secondly, a post-humanist approach of extending family belonging to include dogs-as-dogs and allowing dogs as social agents to shape the everyday routines of 'doing family'.

Some scholars are sceptical of the idea of a post-human family model. Post-humanism challenges notions of human superiority and disrupts human-animal binary but Irvine and Cilia (2017) note our cultural ambivalence to animals and the fact that humans control and

dominate relations with their pets and can choose to surrender them to a shelter for rehoming. On this basis, they suggest that

“the emergence of a truly post-human family remains doubtful” (2017, p. 8).

Instead they favour the ‘more-than-human’ approach for understanding family which encapsulates the more contemporary ideas of family as an active process and rejects the concept of family as a pre-constituted entity. A ‘more-than-human’ family embraces the notion of ‘*becoming with*’ (2017, p. 8). Becoming family is contingent on a cast of nonhuman characters including companion animals (Haraway, 2003). Significantly, their concept of a ‘more-than-human’ family acknowledges the way in which companion animals are actively “doing” family as animals and not pretend humans,

“Pets can actively constitute family as animals, not as surrogate children or furry human beings. Considering families as more-than-human reveals the intertwining of humans and animals without decentering humans, who maintain responsibilities, establish rules, and provide care for other beings” (Irvine and Cilia, 2017, p. 8).

Therefore, existing literature demonstrates that companion animals are regularly categorised as family members by owners who adopt the language of family, not merely from an absence of alternative vocabulary, but intentionally and symbolically to show the importance of the relationship. I sought to engage with a model of family that embraces fluidity and change to explore *how* people construct their companion animals as family members. I believe that a function-based approach to family is especially useful for theorising pets as family. This approach focuses on the way a relationship functions rather than on its form. In this way, family is a verb, an active process, something that members do. To better understand how residential tenants and their companion animals ‘do’ family through everyday practices in the home, I draw on Morgan’s theory of ‘family practices’.

1.6.2 Morgan’s theory of family practices

Morgan draws upon feminist and postmodernist approaches in developing the concept of ‘family practices’ as a way to express the de-institutionalisation of the family and the mutual interconnectedness of family with other social institutions such as work and employment, gender, home, body, care, food (Morgan, 1996, 1999, 2011). In response to the dangers of the reification of ‘the family’, and in recognition of the complex realities of family living, his notion of family practices sees family as a verb rather than a noun. ‘Family’ is not a reified collectivity but a looser, fluid concept. Family is therefore a quality and not a thing, it is

“a constructed quality of human interaction or an active process” (1999, p. 16).

This means that it is possible to see a family dimension in most areas of social inquiry and not just in family studies, for example, in work and employment. He chooses to retain the

vocabulary of 'family', which has been criticised for reproducing heteronormative models of human relationships and thereby limiting diversity (Roseneil, 2005), in recognition of the importance with which social actors assign the language of family in everyday life.

A significant feature of Morgan's work is his rewriting of 'the family' to be fluid and flexible. Fluidity expresses the way in which sets of practices can be viewed through different lenses. For example, if we consider a mother feeding a toddler cereal for breakfast. This regular and repeated practice may be viewed as 'feeding children' or as a 'gendered practice' (as it is the mother rather than the father doing the feeding) or as a 'consumptive practice' or as a 'consumer practice' (as the toddler or mother chose a particular brand of cereal). One social actor may view the situation differently to another and describing it in one way does not invalidate the other descriptions. Similarly, my research participant Josh feeds his cat, Simba, breakfast each morning and this practice can be described in a number of ways: as 'feeding the cat' or as a 'hierarchical expression of dominance' (as the human has control of the food and decides when the cat will be fed) or as a 'caring practice' (meeting the cat's welfare needs as a dependent) or as a 'consumer practice' (Josh said Simba liked a particular brand of cat treats called 'Dreamies'). In this way, family denotes a

"particular way of viewing sets of practices which could be described in other ways"
(Morgan, 1996, p. 191).

Therefore, food and feeding are not simply things family do, but the act of doing them constitutes family. Many families share Sunday lunch together as part of a weekend routine which will include '*family talk*' (Cheal, 2002 cited in Morgan, 2011 at p. 3.4) based on shared past experiences and implied assumptions. This weekly, routine activity is likely to be seen by the social actors as a family practice distinguishable from the act of eating lunch alone at work. In both instances lunch is being eaten but one is a family practice and the other is not. A key feature of family practices, evident from this example, is that the everyday actions in which people are 'doing' family have some effect on another family member. Thus, in sharing Sunday lunch together, family connections are reaffirmed and given significance. This is significant for my research because Morgan shows how someone *becomes* a family member through everyday practices,

"these practices are orientated to another family member. More than this, in enacting these practices, the other is defined as a family member" (2011, p. 3.4).

This illustrates "*the circularity between practices and membership*" and illuminates a way in which companion animals can become family through the "*complex, improvised dance*" in which practice and family relationships are engaged (Morgan, 2011, p. 3.4). In carrying out the everyday practicalities of family life, for example, the bedtime routines and sleeping arrangements that include companion animals as described by my research participants

(see Portfolio component 4 “Analysis of Interviews” 5.2.2 *Agency: Everyday Practices*), the social actors (human and animal alike) are reproducing the relationship within which this activity is carried out and from which it derives its meaning. The French bulldog, Anton, sleeps on my research participant, Emma’s, bed at night and in the daily routine of this sleeping practice of sharing a bed, a practice that is orientated to other family members, Anton’s family membership is endorsed. This ordinary, everyday action of sharing a bed is an intimate activity infused with symbolic meaning that is orientated to family members and in its act reproduces the familial relationship. My research participants did not share their bed with their companion animal because there was nowhere else for the dog/cat to sleep but because allowing the animal to sleep on the bed signifies a close, intimate relationship of mutual-interdependence and thereby defines the animal as a family member and reproduces that familial relationship in everyday life. This demonstrates the circularity Morgan (1996) identifies between family practices and family membership.

Morgan uses the term ‘practices’ to convey a sense of flow, fluidity, regularity, the active and the everyday. Fluidity shows the open-ended character of practices; the way they can be described in two or more ways as illustrated with Josh feeding Dreamies to Simba. Morgan sees this fluidity as a core strength of the practices approach. One consequence being that,

“We do not need to start with ‘family’ in order to consider these practices and relationships. We may begin, say, with food, leisure or transport systems and find ourselves considering family relationships” (Morgan, 2011, p.3.17).

In this way, we may begin with housing and the use of ‘no pet’ covenants in residential leases and find ourselves considering family relationships that exist in the human-companion animal bond. Flow relates to the varying perspectives of observer and observed; Josh may see feeding Simba as a caring practice whereby he meets the welfare needs of his cat while an observer, such as Tuan (2004), may see it as an act of human dominance over an animal. The term ‘practices’ conveys the sense of activity; a parent-child relationship is not static and thing-like, nor is a human-companion animal relationship. These relationships are dynamic and active, each party influencing the behaviour of the other. Practices are regular and repeated activities, not one-off events and they convey the sense of everyday, being fragments of taken-for-granted daily existence, for example, eating breakfast each morning. Everyday life is a key concept for Morgan’s family practices because what matters in understanding social life are the day to day practices of *“real people in real situations”* (Morgan, 2011 at p. 2.2) rather than formal prescriptions of family. Everyday life is also relevant to Michael’s concept of co(a)gency. Michael observed,

“Everyday life is never purely social, it is always heterogeneously made up of technology, humans and nature” (Michael, 2000, p. 124).

Everyday life is a conceptually complex realm embracing fluctuating relations between humans (pet owners, other members of the family), nature (companion animals) and technology (home, furniture, dog-lead). It is within this heterogeneous domain that companion animals are constructed as family members. My research shows how my research participants constructed their companion animals as family members through the agency of the animals in everyday practices in their homes (see Portfolio component 4, “Analysis of Interviews” 5.2.2 *Agency: Everyday Practices*).

Just as Michael emphasised the importance of culture and history in contributing to the heterogeneity and distributedness of co(a)gents, Morgan also highlights how family practices are historically and culturally shaped. The nature of the human-companion animal relationship is situated knowledge, peculiar to a particular time and place, that can only be understood within its cultural context and with reference to the historical background of pet keeping hence my consideration of key aspects of the history of the human-pet relationship in section 1.5.1 of the commentary. The current approach of seeing cats and dogs as family members is very recent in the long history of the human relationship with these animals spanning thousands of years. For most of this time, cats and dogs lived outside and earned their keep by doing work such as hunting, guarding or rat catching (Menache, 2000). It is relatively recent that they have moved into our homes and became valued family members (Franklin, 2006; Fox, 2010). Recent years have seen the growth of pet services such as pet-sitting and walking, grooming and even dog parties (Duke, 2018; Huss, 2003) and Mother’s Day cards from the pet dog/cat are common in high street card shops (see Appendix 2 for an example of a Mother’s Day card from the pet dog which categorises the human-dog relationship in terms of mother-child). Business is recognising this shift with some companies now offering pet related benefits such as “*paw-ternity leave*” for when an employee brings a new dog into their home (Dodgson, 2019). These changes in societal attitudes both contribute to, and reflect, pet owners’ perceptions of their pets as family.

Morgan recognises that whilst family practices are private portraits of everyday domestic life, they also describe wider society,

“The Janus-faced character of everyday life – looking to both self and society at the same time – is seen or constructed in its clearest form in the case of family practices” (1996, p. 193).

The autobiographical accounts of my research participants describing their everyday practices that are shaped by the agency of their companion animals are clearly personal narratives. However, they also describe the values of the wider society within which these

everyday practices took place; a society that both permits and encourages the construction of companion cats and dogs as family members.

Morgan (1999) states that social and cultural institutions are active agents in constructing family practices. Drawing on historical, moral and political accounts, abstract agencies such as professionals, religious leaders, legislators and journalists make representations about what constitutes family and set standards of normality against which people monitor their own practices. Therefore, on the one hand cultural influences normalise the concept of pets as family, such as the Mother's Day card from the pet dog, but on the other hand encourage the ambivalence of animals in society (Arluke and Sanders, 1996; Serpell, 1996). Some scholars believe that this ambivalence towards animals in general can affect the human-companion animal relationship in the home (Charles and Davies, 2008; Power, 2008; Irvine and Cilia, 2017) and this is discussed further in section 1.7. This ambivalence can manifest itself where an owner relinquishes a pet, formerly seen as a family member, because circumstances change and the animal no longer fits with the new situation for example, a young couple have their first baby (Power, 2008; Shir-Vertesh, 2012). The legal status of domestic animals as property reflects this ambivalence and encourages the idea of pets as disposable items of property (Fox, 2004; Francione, 1995). The unregulated use of 'no pet' covenants reflects wider society's contradictory values towards companion animals whom exist on the boundaries of the human/non-human and legal person/property dichotomies simultaneously existing as both family member and personal property. While Morgan's theory of 'family practices' helps show how companion animals become family members, other theoretical tools can be adopted to analyse the type of familial relationship that exists within the human-companion animal relationship. Franklin observes that pets are not just a family member "*but a very close intimate member*" (2006, p. 145).

1.6.3 Pets as family: adapting theoretical tools from Child law

A number of studies have found similarities between people's relationship with pets and with children (Beck and Katcher, 1996; Serpell, 1996; Paul 2000). Over the years, dogs have been selectively bred to show an increasingly neotenous appearance, thereby sharing some of the 'cute' features of human babies that elicit feelings of nurturance and protection (Serpell, 1996). Research shows a similarity between the way mothers talk to their infants (known as 'Motherese') and the way pet owners talk to their pets (Hirsh-Pasek and Treimann, 1982 cited in Serpell, 1996). Beck and Katcher observe that,

"Pets are usually not just any member of the family, however. They are children, a designation partly reflecting the realities of our treatment of pets" (1996, p. 41).

Like children, pets can be touched and stroked at will, require their basic needs of food and water to be met, have their freedom of movement restricted for their own protection and have their sexual expression controlled.

Power identified the “*Parent-Child*” model as one of her three models of the human-companion dog relationship (2008, p.541). Her Parent-Child model sees dogs as dependents, similar to children, with the owner adopting a parenting role performed through relations of care in everyday interaction such as feeding, grooming and walking in order to meet the dog’s unique needs. This model indicates the intense nature of the close bond between the human and dog. The anthropologist, Shir-Vertesh (2012), adopted a similar parent-child model in her research exploring the boundaries and inconsistencies in the human-pet relationship in Israel. Of the 52 couples she interviewed, 39 of them said that their pet was similar to a young child or baby. Using this model she proposed four categories that depict the different ways her interviewees saw their pet: the animal as a “*prechild*”, the animal as a child substitute, the animal as a “*semichild*”, and the animal as significantly different from a child (2012, p. 423). These categories are not static; perceptions shift and change over time following life changes in the family. The categories should therefore be viewed as

“a flexible continuum, a spectrum of the various ways animals are attributed personhood” (2012, p. 423).

The “prechild” category sees pet-keeping as a preliminary stage for a human baby allowing young couples who plan to have children in the future to gain something akin to parenting experience. The child substitute category was relevant to those couples who did not want to have children and instead saw their pet as the child of the family. The “semichild” category referred to those couples who wanted children but did not see their pet as a preparatory stage, instead viewing it as a ‘childlike creature’ who needed love and care. Finally, some owners perceived their pet as significantly different from a child; sometimes defined as a friendship, other times as something distinct from human-human relationships but always seen as part of the family. One of Shir-Vertesh’s research participants describes this category,

“I am always told I probably love the dog less now that I have a daughter. And I say: you can love a girl and a dog, differently but simultaneously. She is not my daughter; she has four legs, not two. But she has another place in my heart. A special, important one” (2012, p. 424).

My research participants Emma, Isabel, Kate and Lucy all couched their relationship with their companion animal in terms of a parent-child relationship (see Portfolio component 4, “Analysis of Interviews” 5.2.1 *Conceptualising pets as family members*). Like children, pets are dependent and vulnerable relying on their owners to satisfy their basic needs. This

shared dependency and vulnerability of children and pets means that caring is a central feature in both parent-child and owner-pet relationships.

In my article in the International Journal of Law, Policy and Family (Rook, 2014; Portfolio component 1, 2.2) I drew on theoretical concepts in child law to justify resolving pet custody disputes using a more diverse test than one based on pure property law principles alone. I argued that the special nature of pets as living and sentient property requires consideration of factors that do not apply to other types of property, factors more applicable to disputes involving child residency. Pet custody disputes arise when a couple decide to separate, and each wants the family pet to reside with them in their new home. If the couple cannot reach an agreement, the question of where the family pet will live may fall to the family courts. Since pets are personal property at law, such disputes between married couples fall within divorce financial proceedings with the court likely to award custody of the pet to whomever can prove better title to the pet, for example, by a receipt of purchase. That pets can be perceived as both property and family blurs the traditional narratives and legitimising discourses of the human/animal and subject/object dichotomies and has led to some lawyers (presumably those acting for the party with a weaker property claim to the pet) to seek to persuade the court to adopt a 'best interests of the animal' test. With no reported cases in England, my article examines the approach taken in countries with reported cases: the USA and Israel. My review of the case law concluded that,

"the majority of the cases share the same underlying inconsistency between the courts' insistence that animals are personal property and their reluctance to rely on property principles alone to resolve the dispute" (Rook, 2014, p.180).

In *Arrington v Arrington* (1981) 613 S.W. 2d 565 (Tex. Civ. App) a Texas trial court insisted that pets are property and refused to apply a 'best interest of the pet' test. Despite this, the court awarded custody to the wife and visitation rights to the husband. This is at odds with the judge's insistence that pets are property since visitation rights are not awarded in relation to personal property. The judge clearly struggled with using a pure property law test to resolve the dispute and consequently awarded visitation rights to the husband in recognition of the strong emotional bond existing between him and the dog.

In *Juelfs v Gough* (2002) 41 P.3d 593, the Alaska Supreme Court upheld the award of sole custody of the family dog to the husband even though the wife had a stronger title claim. The dog was at risk of serious physical injury at the wife's residence due to other dogs living with her which were a threat to the dog. Therefore, the interest of the dog in avoiding physical injury prevailed over the application of a pure property law test.

In response to the inadequacies of a pure property law test, my article seeks to devise a more appropriate test to resolving pet custody disputes; a test that falls within the existing

property paradigm (as this is unlikely to change for companion animals in the foreseeable future) but which better recognises the unique character of this property as living and sentient. There are important consequences that flow from this recognition that the property is living and sentient: first, strong emotional bonds can develop between the property and its owner (a relevant factor in *Arrington v Arrington*); second, as a sentient being the animal has an interest in avoiding pain and suffering (a relevant factor in *Juelfs v Gough*).

The existing literature drew analogies with child residency cases (Britton, 2006, Huss, 2003, Lerner, 2010) and since children's rights and 'the best interest of the child' test have been extensively analysed (Mnookin, 1975; Eekelaar, 1986; Eekelaar, 1994; Herring, 2005; Fortin, 2009), I sought to draw upon these well researched theoretical models to devise a test for resolving pet custody disputes. The fact that the parent-child model has been successfully applied to the human-dog relationship based on concepts of dependency, vulnerability and relations of care (Power, 2008; Shir-Vertesh, 2012) demonstrates the suitability of this approach. Mnookin's seminal article on child residency cases from the 1970s sought to overcome the inadequacies of the then applicable 'best interest of the child' test by devising two intermediate rules to partially replace it. I found Mnookin's two rules to have relevance to pet custody cases because of the character of the human-companion animal relationship. Eekelaar explained these rules in the following terms:

"One was that no action should be taken which would pose an immediate and substantial threat to the child's physical health and the other that, in disputes between parents, the court should prefer the adult 'who has a psychological relationship with the child from the child's perspective'" (Eekelaar, 1986, p. 45).

What is particularly interesting is the underlying justifications for Mnookin's two intermediate rules; firstly, that society seeks to prevent physical harm to children; and secondly, the recognition that children are capable of strong emotional relationships with others. There are clear parallels here to companion animals as society seeks to prevent unnecessary suffering to domestic animals (for example, the cruelty offence under section 4, Animal Welfare Act 2006) and companion animals are capable of strong emotional bonds with their owners. Given the similarity, I sought to apply Mnookin's intermediate rules by analogy in pet custody disputes to propose a more suitable test that recognises pets as living and sentient property bound in relations of dependency and vulnerability with their human owners. The pet custody cases from the USA showed how courts struggle to decide cases on property law principles alone and have been receptive to taking other considerations into account specifically the interest an animal has in avoiding physical injury (*Juelfs v Gough*) and the close emotional bond that can develop between a companion animal and a human (*Arrington v Arrington*).

Like children, pets are vulnerable and dependent beings but while children usually become independent and leave home or in some cases assume the caring role of the parent, pets remain dependents their whole life. In reference to the permanent dependency of domestic animals on humans, Satz observes,

“Domestic nonhuman animals are, for this reason, perhaps the most vulnerable of all sentient beings” (2009, p. 80).

Companion animals are completely dependent on their owners in the home to provide nourishment, medical care and a suitable environment in which to live. This responsibility is incorporated into English law by section 9, Animal Welfare Act 2006 (AWA 2006) which imposes a positive duty on those responsible for domestic animals, including pet owners, to meet the welfare needs of their animals. Section 9 incorporates the five freedoms of the Brambell report (Brambell, 1965) being a need for a suitable environment, a suitable diet, to exhibit normal behaviour patterns, to be housed with or apart from other animals and to be protected from pain, suffering, injury and disease (s.9, AWA 2006). This dependency, shared by children and animals, permits analogies to be drawn with the attempt to categorise children’s rights in the 1980s. Bevan’s broad categories of protective and self-assertive rights (Bevan, 1989) and Eekelaar’s three categories of basic, developmental and autonomy interests (Eekelaar, 1986) identify a category of fundamental rights arising from the innate dependence and vulnerability of children and

“an obvious need for nurture, love and care, both physical and psychological” (Fontin, 2009, p. 17).

A similar category of fundamental rights could be applied by analogy to pets given their dependency and vulnerability. Eekelaar observed how in nineteenth century England the outcome of a child residency case could take a very different turn if the basic interests of the child were at risk. At that time, the interests of a father generally prevailed over those of the child in residency cases but this approach was reversed if the basic interests of the child were threatened, for example, if the child was at risk of physical injury (*R v De Manneville* (1804) 5 East 221). Thus, society prioritised the fundamental rights of children, arising from their dependency, and these rights prevailed over the interests of their parent. A similar reversal in approach is seen in court decisions in pet custody disputes where the interest of a companion animal in avoiding physical harm prevails over the rights of the property owner. For example, in *Juelfs v Gough* where the dog’s interest in avoiding physical injury prevailed over the wife’s superior claim to property title of the dog. This approach of reversing priority evident in both cases of child residency and pet custody disputes demonstrates the underlying similarity of the position of children and pets as dependent and vulnerable beings. This adds credence to the argument that the human-companion animal relationship shares

traits with the parent-child relationship. Having examined theoretical models of pets as family based on everyday family practices as well as caring practices (arising from the dependency of the companion animal), it is appropriate to move to consider a possible expansion of the definition of family at law to include companion animals.

1.6.4 The expansion of the legal definition of family to include companion animals

Whilst there is no all-encompassing definition of family in English law, the term appears in numerous laws (for example, in housing, immigration and employment). Herring suggests that the term 'family' has "*limited legal significance*" and whilst there are many cases defining 'marriage' and 'parents', there are relatively few cases on the meaning of 'family' (2019, p. 2). For some scholars, the key to defining family in law is to identify those persons intended to be covered by a specific law,

"It is not that some groups are family and some are not, but that some family groups may need the benefits of a particular law and others not" (Herring, 2019, p. 5).

In the context of housing law, it is those who reside with the tenant in the property as their home that need the protection of the law. A tenant may enjoy a large family with clear blood and/or legal ties spread across the world but it is only those persons who reside with the tenant (whether in a formal or de facto familial relationship) who will be concerned to come within the definition of family for the purposes of housing law. This is a significant point in the argument for defining pets as family within housing law. It is because companion animals live in close proximity to their owners in the home that questions about the familial character of the human-companion animal relationship arise in housing law. Reliance in housing disputes on human rights arguments under Article 8 ECHR to protect family life only encompass those living together in a home.

"The essential ingredient of family life is the right to live together so that family relationships may develop normally (Marckx v Belgium, 31) and members of the family may enjoy other's company" (European Court of Human Rights, 2019, p.58).

Therefore, the examination of pets as family in this commentary is limited to the context of housing law and is not intended to extend beyond the need to protect those living together in a household as a family from forced separation.

My approach in my article on pet custody disputes (Rook, 2014, Portfolio component 1, 2.2) was to explore debates on the cusp of legal changes in child law and see how underlying justifications for these past legal changes could apply by analogy to companion animals in pet custody disputes. Over 150 years there had been significant shifts in approach in child law in England; from protecting a father's pecuniary interest in his child, to protecting the child in their own right first through a 'best interest of the child' test and then to the current

test that elevates the welfare of the child to the paramount consideration (with a rebuttable presumption of parental involvement enshrined in law that sees the involvement of both parents as beneficial to the child (s.1(2A), Children and Families Act 2014)). I reviewed the older literature, published at the point in time where shifts in the approach to child residency law were first analysed, and discovered valuable theoretical models for analysing pet custody disputes. For example, Mnookin's two intermediate rules as discussed in the previous section. I here propose adopting a similar approach of exploring debates on the cusp of past legal change, in this instance, changes in the legal definition of family. The existing literature acknowledges that the definition of family within family law is ever-changing to reflect changing societal attitudes (Dewar, 2000; Diduck, 2011; Herring, 2019). By reviewing arguments used at the time to expand the concept of family at law, for example to include same-sex couples, I can adopt similar arguments by analogy to better protect the human-companion animal relationship in housing law within the concept of family. A relevant example of the process of the evolution of the legal definition of family in English law is the recent acceptance of same-sex couples as family. This development occurred in a housing law case in the English Supreme Court (*Fitzpatrick v Sterling House* [2001] 1 AC 27). Examining the underlying justifications for this change in family law, allows me to identify and harness arguments for a further expansion of the legal definition of family within housing to include companion animals. This necessitates reviewing the relevant literature at the time (from the 1990s onwards) that preceded the change in the legal status of same-sex couples and legitimised and justified this change. These arguments may then be applied by analogy to further expand the definition of family within housing to include companion animals.

Sociologists played a key role in scrutinising the lived experience of same-sex couples to understand the nature of their relationship (Weston, 1991; Weeks, Donovan and Heaphy, 1996). This was significant because one of the key components of the debate to expand the definition of family to include same-sex couples was the character of the relationship between the couples. It was argued that as lesbians and gays now had the chance to freely construct relationships based on qualities attributed to ideal notions of the traditional heterosexual family, such as mutual inter-dependence and intimacy, deploying the language of family to same-sex couples was appropriate.

It was argued that changes in society at that time saw the rise of individualism in relationships which prioritised individual choice in lifestyle and partners leading to what Giddens called "*the transformation of intimacy*" and the rise of the "*pure relationship*" (Giddens, 1992, p.58). Giddens suggests that intimate partners stay together in a pure relationship only in so far as it provides sufficient satisfaction for each party to stay in the

relationship. This focus on individual choice, agency and autonomy through the emergence of the reflexive self transforms intimacy.

"Intimacy, in its modern form, implies a radical democratization of the interpersonal domain" (Weeks, Donovan and Heaphy, 1999, p. 85).

This change in relationship patterns cut across the heterosexual/homosexual dichotomy with the emergence of common patterns in lifestyle as people, whatever their sexual orientation, were driven by the search for a satisfactory intimate relationship. It is the relationship itself that is the defining factor within the private, intimate sphere of everyday life. This approach focuses on the importance of intimacy, relationships and individual choice in advocating change. Although sexual relations will be a part of intimacy in many cases, it is not an essential component. For example, the Private Members' Bill, Civil Partnership Act 2004 (Amendment) (Sibling Couples) Bill sought to expand the concept of civil partnership to unmarried siblings. This is an illuminating example of the fluidity of the concept of family and partnership. Intimacy is multi-dimensional and includes

"close association and privileged knowledge" and *"loving, caring and sharing"* (Jamieson, 1998, p. 8).

There are parallels here with the human-companion animal relationship which shares some of the traits of a partner in terms of intimacy, closeness, trust and inter-dependence in a sustained association but without any sexual relations. With the transformation of intimacy, couples exercise individual choice and enter into a relationship for its own sake to enjoy the benefits of a sustained association with another. There is no reason why individual choice may not cross the species barrier and extend to an intimate, close relationship with a nonhuman animal.

This approach raises questions about the distinction between family relationships and other relationships, particularly friendship. Certainly, the line of demarcation between family and friends has blurred with the greater acceptance in society of individual choice and diversity. The 'friends as family' model (Westwood, 2013), represented by the concept of 'families we choose' (Weston, 1991) is especially relevant within the LGBT community. What was striking at the time was the fact that the language of family was not deployed in non-heterosexual relationships in wider society but was commonly used among lesbian and gay couples, in conjunction with the terms 'choice' or 'created' (Weeks, Donovan and Heaphy, 1999). This self-definition approach to family, recognising diversity in family forms on the basis of a group's self-identification as a family, was acknowledged in the literature at the time (Eekelaar and Nhlapo, 1998). Research showed that homosexuals were not imitating heterosexual families nor trying to replace or substitute a family of choice for one of origin but instead adopted a broader definition of family,

“for many non-heterosexuals the term ‘family’ embraces a variety of selected relationships that includes lovers, possibly ex-lovers, intimate friends, as well as blood relatives, and is as real as the family of origin” (Weeks, Donovan and Heaphy, 1999, p. 89-90).

Current concepts of family in law and social policy exclude companion animals while the pet-owners themselves commonly refer to their pets as part of the family, embracing a broad definition of family that can traverse the species barrier. Just as the law eventually caught up with the reality of homosexual couples living in familial relationships, it is possible that a similar shift will occur enabling the valued relationships pet-owning tenants have with their animals to be given full recognition as family within housing law. Self-definition alone will not be sufficient to persuade a court that a companion animal is a family member but comparisons with how the LGBT community deployed the language of family (with the qualifying words ‘of choice’) provide a valuable analogy. The concept of ‘family’ is infused with cultural and symbolic meaning and its importance is universally understood so the fact that pet-owning tenants self-define their pets as family elevates the standing of the human-companion animal relationship in the eyes of others who may not appreciate its significance.

The literature suggests that people distinguish between family and friends by way of obligation, responsibility and commitment, characteristics more prevalent in a familial relationship (Roberts and McGlone, 1997). Questions of obligation, responsibility and commitment arise within the context of the parent-child relationship and as discussed previously in section 1.6.3, give rise to parallels between the dependent and vulnerable status of young children and that of companion animals.

Caselaw shows that courts are willing to accept a more expansive definition of family beyond the formal criteria of marriage, birth and adoption where there is proof that the relationship in question satisfies the attributes of traditional familial relations. Both the English Supreme Court and the European Court of Human Rights have adopted this alternative approach to defining de facto family relationships in the absence of formal legal status. In *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27 the Supreme Court held that a homosexual partner of a tenant, who resided for 18 years in the rental property with the tenant prior to the tenant’s death came within the meaning of “*a member of the tenant’s family*” in the Rent Act 1977 and consequently was permitted to succeed to the deceased tenant’s tenancy. The majority decision relied on the character of the relationship between the two men and the fact that it had all the hallmarks of a familial relationship,

“there should be a degree of mutual inter-dependence, of the sharing of lives, of caring and love, or commitment and support” (Lord Slynn, at p. 32).

These characteristics are presumed to exist in legal relationships (such as between a husband and wife) but if proved to exist in de facto relationships may constitute family

membership. Although the court was unwilling to define the same-sex relationship as equivalent to husband and wife, it accepted its familial character. A few years later in *Ghaidan v Mendoza* [2004] 3 All ER 411 the Supreme Court went a step further in defining the same-sex relationship as being equivalent in character to a spouse. The court held that a homosexual couple who were living together in a long-term relationship could fall within para.2 of schedule 1 of the Rent Act 1977 which permits a “*surviving spouse*” or “*a person who was living with the original tenant as his or her wife or husband*” to succeed to the statutory tenancy of the deceased. Using the Human Rights Act 1998 to ensure the compatibility of the Rent Act 1977 with the ECHR, the Supreme Court interpreted the statutory words in para. 2 to include long-term same sex partners. As with the majority decision in *Fitzpatrick*, the court relied on the character of the same-sex relationship and its proximity to a traditional heterosexual nuclear family to justify its expansive interpretation of the statutory wording.

The European Court of Human Rights has considered the definition of family within Art.8 ECHR and said that the notion of family life is an autonomous concept (*Marckx v Belgium* (1979) at 31) and therefore it is a question of fact depending on

“*the real existence in practice of close personal ties*” (*Paradiso and Campanelli v Italy* (2017) at 140).

Therefore, in the absence of legally recognised family ties the court will examine de facto family ties such as cohabitation and commitment. This is a similar approach to defining ‘home’ within the context of Art.8. Home is an autonomous concept that is independent of classification in domestic law. It depends on establishing “*sufficient and continuous links*” between the individual and the property and not on proving a legitimate proprietary or contractual interest. The domestic authority for this approach is *Qazi v London Borough of Harrow* [2001] All ER (D) 16 in which the Court of Appeal held that a tenant still inhabited property as his home within Art. 8 even though the tenancy had been terminated and he no longer lawfully resided there (this approach was later confirmed as correct by the Supreme Court). In reaching their decision the Court of Appeal used several academic texts including my book (Portfolio component 1, 2.4), Arden LJ stated:

“*The most detailed treatment of “home” for the purposes of Article 8 from the viewpoint of our domestic law is in Property Law and Human Rights by Deborah Rook. In a long passage dealing with recent authorities, she seems to accept that a squatter may be able to establish the applicability of Article 8*” (Arden LJ, at para.30).

Whilst not going as far as deciding the position for a squatter, the court did decide that a tenant who resided in property after the lease had been lawfully terminated could come within the protection of Art.8. A similar line of argument can be used in relation to the concept of family under Art.8. As with ‘home’ it is also an autonomous concept and, in this

case, depends on establishing “*close personal ties*” rather than proving legally recognised family ties. In *Moretti and Benedetti v Italy* (2010) the European Court of Human Rights held that family life existed between foster parents and a foster child in their temporary care on the basis of,

“*the close personal ties between them, the role played by the adults vis a vis the child, and the time spent together*”. (at 48)

These cases illustrate that in determining family membership in the context of specific laws, the courts will look beyond formal blood and legal bonds and examine the character of the relationship in question to assess its proximity to traditional family relationships. In identifying the hallmarks of the familial relationship, the relevant characteristics vary depending on whether it is a parent-child relationship (as in *Moretti and Benedetti v Italy*) or a couple relationship (as in *Fitzpatrick v Sterling Housing Association*). *Fitzpatrick* identified the characteristics relevant to couples as mutual inter-dependence, caring and love, commitment and a sharing of lives. Many human-companion animal relationships bear these same traits of a familial relationship, especially in a sharing of everyday lives and providing mutual love and support over many years. For a parent-child relationship the hallmarks of a familial relationship give rise to other characteristics, emphasising responsibility, dependency and obligation. These traits are especially relevant to the human-companion animal relationship given the vulnerability and dependency of pets on their owners to meet their basic welfare needs. The human-companion animal relationship is a unique relationship within the family combining love, a sharing of lives, dependency, caregiving and receiving, vulnerability, emotional support, agency, commitment and continuity over time and otherness. It is here advocated that these traits demonstrate sufficient “*close personal ties*” to come within the autonomous concept of family life within the context of Art.8 of the ECHR.

Reliance on an idealised image of the traditional nuclear family is seen as problematic for regulating the diversity of family forms and practices in contemporary society. The above case law demonstrates how same-sex relationships or quasi-parental relationships are recognised on the basis of their proximity to the nuclear family model (Bremner, 2019). Many scholars argue that an alternative model is needed, one that moves away from the concept of the idealised nuclear family and instead more fully embraces the diversity of family in twenty-first century England (Diduck, 2011; Brown, 2019). The function-based model of family is one such alternative and is particularly appropriate to extending family membership to companion animals. This model focuses on the function of a family, for example, its central function of caring.

“*What makes a relationship familial to me then is not necessarily a biological, legal, or conjugal connection, rather it is what people do in it, it is a relationship*”

characterized by some degree of intimacy, interdependence and care” (Diduck, 2011, p. 289).

In response to claims that the role of family law is uncertain leading to a chaotic approach that is nevertheless normal given the ever-changing nature of family over time (Dewar, 2000), Diduck argues that family law’s purpose has in fact remained consistent,

“family law is about determining responsibility for responsibility” (2011, p. 292).

In allocating and enforcing responsibilities for matters such as the care of children and housing, the purpose of family law remains constant. By examining English ancillary relief cases over a 15-year period, Diduck (2011) found distinctive shifts in the discursive frameworks used in the judgments from the language of paternalism/welfare (reinforcing the values of the traditional patriarchal family) to that of equality/rights (which resonated with the emerging social movements towards rights and equality in wider society at that time) and finally to that of individualism/autonomy (fitting with the increasing individualization of society noted by Giddens, 1992). However, she advocates that the law’s purpose in allocating responsibility for financial and care responsibilities remained constant over the 15-year period. It was the shifts in the discourses used to articulate that aim that led to variations in the outcomes of the cases and gave the impression of uncertainty in family law. The residency of children clearly falls within family law as it concerns allocating responsibility for the care and housing of children, but the residency of a family pet following divorce also falls under family law. Pet custody disputes are resolved as part of divorce financial provision in the English family courts (Rook, 2014). Whilst this could be seen as merely distributing family property, I suggest that the unique character of pets as living and sentient property requires the court to allocate responsibility for the care and housing of the pet, for example, not placing the pet in a home where it is at risk of physical injury (as in *Juelfs v Gough*). Therefore, for Diduck a relationship is familial if people ‘do’ caring and intimacy and are interdependent on each other within the relationship (all of which can apply to the human-companion animal relationship) and the role of family law is to allocate and enforce responsibilities that are linked to that relationship.

1.6.5 Recognising pets as family under English housing law

The analysis in the preceding sections of the commentary show that there is a strong argument for recognising and protecting the human-companion animal relationship as a familial relationship within the context of housing law. The argument can be applied under alternative models of family which thereby increases its persuasiveness. Firstly, under a model of family that relies on the character of the relationship and its proximity to marital and

parent-child relationships in legally recognised families (the traditional nuclear family model). This approach has been used by the courts to expand the legal definition of family to include same-sex couples based on the similar traits of their relationship to that of legally recognised marital relationships between heterosexual couples, for example, to allow a surviving partner of a same-sex couple to succeed to a secure tenancy (*Fitzpatrick v Sterling Housing Association*). Similarly, foster children have been defined as family because of their proximity to parent-child relationships (*Moretti and Benedetti v Italy*). Adopting this model of recognising similar traits, it is possible to show how the human-companion animal relationship shares sufficient traits with central family relationships to justify and legitimise protecting the relationship within housing law and practice. It shares traits associated with that of a partner (with the exclusion of sexual relations) as well as some of the hallmarks of a parent-young child relationship. There is both a sharing of lives and mutual inter-dependence of a chosen partner as well as the dependency and vulnerability inherent in a parent-child relationship. Given these clear parallels it is difficult to legitimise counter arguments that exclude pets from family membership in housing law and practice, other than through speciesism, defined as discriminatory treatment on the basis of species membership alone, (Singer, 1995) or ambivalence to animals (the ambivalence surrounding human-animal relations is examined in section 1.7 below).

Secondly, the argument can be applied under a function-based model of family that encapsulates two elements: caring practices (Diduck, 2011) and everyday practices (Morgan, 1996). For Diduck,

“the primary role allocated to ‘family’ in contemporary society is the care of dependents” (2011, p. 291).

If companion animals were human, there is no doubt they would enjoy the protection of family membership in housing law under this model of caring practices. They are completely dependent on their owner to satisfy their basic needs of nourishment, health care and social interaction whilst living in the home. This vulnerability and dependency will continue for their whole life, but care giving is not a one-way process because many companion animals also provide care to their owners. The exclusion of companion animals from family membership under a caring practices model of family is therefore only possible on the basis of their species. The question is whether this speciesism is justified in housing law and policy. Reliance on Morgan’s family practices model of family reaches the same conclusion that companion animals are family members. In this case it is their active involvement in ‘doing’ family in the everyday routines of family life that is relevant. For Morgan, family is an active process, and the analysis of my interview data illustrates how my research participants’ companion animals were ‘doing’ family in everyday practices in the home (see Portfolio

component 4 “Analysis of Interviews”). For Morgan (1999) the themes of flux, fluidity and change are vital in understanding modern family life and ‘family practices’ are a way of conceptualising this.

Until recently, seeing companion animals as family members was viewed through a humanist framework (Arluke and Sanders, 1996). Under this perspective, pets are incorporated into the family but the family itself remains unchanged. The pet is a passive body that is shaped and moulded to fit within a pre-existing human-centred family and home life. To explain pets as family members, Hickrod and Schmitt (1982) used symbolic interactionism and Goffman’s (1974) ‘frame analysis’ but they saw pets only as ‘pretend’ members of the family because it was viewed as a human institution (cited in Irvine and Cilia, 2017). More recently, these human-centred approaches are being challenged by studies showing that pet owners experience their companion animals as ‘minded social actors’ (Sanders, 1993; Fox, 2006; Power, 2008). These studies

“urge a re-thinking of human-animal family relations that is attentive to the everyday, embodied encounters between people and animals and suggest that animals may actively shape the ways that family and home are lived in the everyday” (Power, 2008, p. 537).

In challenging pets as passive family members, Power’s “*more-than-human families*” describes

“kinship where dogs and people are mutually entwined in unique, open-ended encounters” (2008, p. 537).

Given my social constructionist worldview and my belief in the hybrid heterogeneity of ‘more-than-human’ families and multi-species tenancies, it is not surprising that I see several interwoven strands in understanding *how* pets become family. These strands include:

- (i) Intimacy within the human-companion animal relationship with a sharing of lives, inter-dependence, love and trust as a long-term commitment; and
- (ii) Companion animals as social agents actively engaged in ‘doing’ family in the everyday practices within the home through active participation in family routines which can change through the agency of the animal; and
- (iii) Companion animals providing socially supportive relationships as givers and recipients of care; and
- (iv) Obligation, responsibility and commitment on the part of the pet-owner who assumes caring duties for the vulnerable and dependent animal for the duration of its life; and
- (v) The symbiotic and dynamic relationship existing between pets and other family members that act as a conduit of communication or enduring link between the pet

owner and others family members. For example, for my research participant, Bob, his dog was a final link to his deceased spouse (see Portfolio component 4, “Analysis of interviews”, 5.4 *Narrative Analysis*).

Together these strands support recognising pets as family members within housing law and policy using various models of family based on the character and function of the human-companion animal relationship.

If fluidity and change in family arrangements is taken seriously and if policy and law is open to diversity and a willingness to change to reflect this, then there is a strong argument that housing law and policy within the residential rental sector should change to protect the human-companion animal relationship as a familial relationship. It is not without significance that Andrew Rosindell MP recently relied on family relationships to justify his Private Members’ Bill to prohibit the use of ‘no pet’ covenants in residential leases in England. In his Parliamentary speech introducing the Bill, he observed that,

“Dogs are more than ‘man’s best friend’: they are equal members of the family and for most people, being separated from your dog is no different than being separated from a brother or sister” (Rosindell, 2020).

That such emotive language can be used in Parliament illustrates the strength of feeling the human-companion animal relationship can arouse, however, this needs to be set within the wider context of human ambivalence to animals and the barriers such ambivalence may create to protecting companion animals in housing.

1.7 The ambivalence surrounding human-animal relations

Our relationship with animals has been described as ‘ambivalent’ (Serpell, 1996; Charles and Davies, 2008; Irvine and Cilia, 2017). The simultaneous existence of conflicting attitudes towards animals is not surprising given the history of our relationship with them and our need to dominate and control domestic animals (see section 1.5.1 *The history of the human-pet relationship: defusing conflict*). There is a contradiction between, on the one hand, acknowledging the similarities between humans and nonhuman animals as sentient, living beings for whom close attachments can develop and, on the other, regarding them as human resources to be exploited and killed for our own ends (Francione, 2000). Western culture is divided on the moral status of animals (Singer, 1995; Cohen, 1997; Posner, 2004; Regan, 2004) and Francione’s (2000) concept of ‘*moral schizophrenia*’ refers to our inconsistent relations with animals that enables us to lavish some domestic animals, our pets, with love and affection while simultaneously supporting the ‘*institutionalised exploitation*’ of millions of other domestic animals through intensive farming, scientific experimentation and entertainment. In contemporary England this ambivalence is ever

present and visible in the differential treatment of a cherished pet dog compared to a pig raised in an intensive farm for meat, and embodies

“two totally contradictory and incompatible sets of moral values” (Serpell, 1996, p. 19).

Some scholars believe this ambivalence permeates the human-companion animal relationship (Fox, 2006; Charles and Davies, 2008; Power, 2008) and it has been suggested that what it means for a pet to ‘be’ family varies greatly because of it (Irvine and Cilia, 2017). Shir-Vertesh’s (2012) research in Israel found that loving relationships between people and their pets did not always endure. Some owners initially treated their pets as members of their family, similar to small children, but later redefined or even terminated the relationship when changes in their life occurred especially the introduction of a new baby into the family. Shir-Vertesh introduces the concept of ‘flexible personhood’ and argues that pets can be

“viewed along a humanness-animality continuum, flexibly positioned at different parts of the gamut as changes occur in the family and in the lives of its members” (2012, p. 428).

That relationships can change within a family in response to life changing events is not surprising; it occurs in human-human familial relationships, for example, a couple may become distant from each other following the birth or death of a child. The precarious position of pets as property at law (examined in section 1.8 below) means that a change in their relationship within the family can result in their being unilaterally removed from it.

Some scholars challenge Cartesian notions of binary divisions between humans and non-human animals and advocate a post-humanist perspective in which boundaries between humans and animals are broken down (Fox, 2006). Fox’s ethnographic research in the field of human geography concerned pet owners in Britain and examined how people use the categories of ‘animal’ and ‘human’ to understand their pets. She used pet ownership as a case study to apply the theoretical concept of post-humanism to everyday life. Post-humanism disrupts human-animal binaries and as pets occupy ‘*a liminal position*’ perceived as both ‘*minded individuals*’ and ‘*disposable possessions*’, they provided an ideal subject for her study (Fox, 2006, p. 526). She found that pet owners readily mix and match these two different interpretations of their animals in everyday practices, sometimes seeing them as human-like and other times as animal. Shir-Vertesh’s findings discovered a similar approach in Israel emphasising the fluidity in the category ‘pet’ thereby demonstrating

“the possibility of flux between person and nonperson” (2012, p. 428).

Fox (2006) suggests that the way in which people understand their pets as both ‘human’ and ‘animal’ disrupts the traditional binary of human versus nonhuman and demonstrates how

post-humanism can exist in the lived reality of everyday living. Others, unpersuaded by this argument, suggest that Fox's findings merely demonstrate how

"a humanist category is used to construct how people view animals (Charles and Davies, 2008, p. 2.4).

Fox acknowledges that in our relations with pets *"humanity still remains the key reference point"* (2006, p. 535) but nonetheless pet owners do challenge these Cartesian binaries. Shir-Vertesh suggests that her concept of flexible personhood, whereby pets can be flexibly incorporated into the family one day and rejected from it on another, preserves the prominence of humanity,

"Flexibility in the treatment of animals shows that human boundaries are not becoming insignificant or blurred and that "the human" is not losing its distinction from "the other" (2012, p. 429).

Shir-Vertesh's three case studies of dogs, once cherished as close family members being ignored or rehomed with the arrival of human babies, demonstrate flexible personhood. However, it is arguable that the frequency with which this occurs in her research may be explained by her sampling methods. Her research participants were all young middle to upper class Jewish couples from southern Israel an area where procreation and family is highly prized and where religion objects to strong emotional feelings towards animals and discourages pet keeping. In this environment, it is easy to see how a pet dog could be displaced from the family by the arrival of a new baby. Shir-Vertesh rejects her findings as an idiosyncratic Israeli phenomenon pointing out the high rates of companion animal abandonment and rehoming in the USA and Europe. The large numbers of companion animals relinquished to animal shelters each year appears to testify to the ambivalence in the human-companion animal relationship, although some of this is the result of pet-owning tenants being forced to rehome their dog or cat due to 'no pet' covenants. The legal status of domestic animals as property or 'legal things' encourages their conceptualisation as human resources and perpetuates ambivalence to animals.

1.8 The legal status of companion animals

There is extensive literature on the legal status of animals especially around the contentious debate of granting legal personhood to animals (Wise, 2002; Francione, 2007; Cupp, 2013; Rook, 2016). As discussed in section 1.3 above, time and space allows only a brief consideration of this large body of literature but to exclude it altogether would be to ignore a significant feature of the human-companion animal relationship. The law distinguishes between 'persons' and 'things' with all human beings benefiting from legal personhood, while all domestic and captive animals are legal things categorised as property (Wise, 2000). Such a simplistic division of humans and animals in law is problematic and arbitrary (Fox, 2004, p.

474). Many scholars have noted how the law has failed to keep pace with the cultural shift in how people in the Western world perceive pets as family members leaving the law out of touch with reality (Britton, 2006; Sullivan and Vietzke, 2008; Rook, 2014; Kymlicka, 2017). The contradictory status of companion animals as both family (in the eyes of their owners) and property (in the eyes of the law) makes their position unique. Fox and Ray observe,

“This disjuncture between social and legal attitudes entails that companion animals occupy a particularly contested zone between object and living being” (2019, p. 213).

Therefore, companion animals are “*boundary animals*” (Fox, 2004, p. 479) and “*liminal beings*” (Fox and Ray, 2019, p. 213) straddling the line of demarcation between human and animal and challenging the human/animal binary at law. Judges in two cases involving pets, one in the USA and one in Israel, have recognised this,

“animals are not property, rather a unique construction existing somewhere between inanimate objects and humans” (Corso v Crawford Dog and Cat Hospital (1979) 315 NYS 2d. 182; Ploni v Plonit, 2004, Ramat Gan Family Court FC 32405/01).

The legal status of companion animals as property raises a number of concerns within the context of ‘no pet’ covenants:

- (i) it is at odds with the reality of how many pet owning tenants construct their companion animals as family members (Fox, 2004; Charles and Davies, 2008; Charles, 2014); and
- (ii) it undermines the significance of the relationship to the pet owner and fails to appreciate the magnitude of the harm caused to the tenant by a forced separation; and
- (iii) it ignores the welfare interests of the companion animal in being able to maintain a stable relationship with the person to whom they are close; and
- (iv) it perpetuates the idea that a companion animal can be discarded if the tenancy agreement prohibits pets and thereby relegates a forced separation of the owner and their pet to the comfortable realms of mere property loss.

This trivialises the enormity of what is being imposed upon a pet-owning tenant as illustrated by my research participant, Kate, who suffered significant loss after being forced to rehome her two dogs, whom she viewed as part of the family, due to a ‘no pet’ covenant (see Portfolio component 4, “Analysis of interviews”, 5.4 *Narrative Analysis*).

1.8.1 The property versus legal personhood debate

Legal personhood is not synonymous with being human; it identifies those entities that are capable of having legal rights (Schaffner, 2011). It includes all humans but historically it was a more restrictive category with legal personhood being denied to slaves, women and

indigenous people (Wise, 2000). In more recent times the category has been expanded to include nonhuman entities, for example, a private company is a legal person (Midgley, 1985) thereby allowing it to protect its property interests under the Human Rights Act 1998 (Rook, 2001, Portfolio component 1, 2.4). In New Zealand, the Te Urewera Act 2014 granted legal personhood to a former national park, Te Urewera, granting it all the rights, powers, duties and liabilities of a legal person (Rousseau, 2016). Since 2000 there have been a number of court cases across the globe challenging the property status of specific captive animals including chimpanzees (in Brazil, Austria and the USA) and orca whales (in the USA) (for example, *Non-Human Rights Project, inc., Tommy v Lavery* [2015] 26 NY3d 902; *Tilikum v. Sea World Parks & Entertainment, Inc.*, (2012) 842 F.Supp. 2d 1259). The cases rely on the cognitive abilities of the animals and their 'sameness' to humans. Whilst they have been unsuccessful to date, they have nevertheless raised awareness in academic circles of this contentious issue with numerous articles published in recent years (for example, Wise, 2007; Kerr *et al*, 2013; Cupp, 2017). My contribution to Bailey, D. (ed) (2016) *Practical Veterinary Forensics* on the challenges to the legal status of domestic and captive animals provides further evidence of this debate (Portfolio component 1, 2.3). In 2016, an Argentinian court granted a habeas corpus to a captive chimpanzee, Cecilia, declaring her a non-human legal person (*A.F.A.D.A about the chimpanzee 'Cecilia'*, (2016) File No. P-72.254/15; Samuels, 2016). Although a legal first, it has had little wider impact overseas because the case was decided using environmental legislation specific to Argentina.

Many scholars are frustrated at the property status of domestic and captive animals and the arbitrariness of the "*impenetrable legal wall*" (Wise, 2000, p. 4) that exists between humans and all non-human animals (Fox, 2004; Satz, 2009; Kymlicka, 2017). In consequence of this legal wall, the legal framework to protect animals has been "*largely impervious to meaningful reform*" with any new animal welfare laws being described as "*treading water*" (Kymlicka, 2017, pp. 124 and 125). Numerous rights theories exist based on an animal's sentience and rationality (Francione, 2000; Wise, 2000; Regan, 2004). For example, Wise advocates that any being (whatever species) with mental abilities adding up to "*practical autonomy*" should be entitled to legal rights of bodily integrity and bodily liberty (2002, p.32). Francione's (2000) concept of "*moral schizophrenia*" demonstrates the contradictory nature of our relationship with domestic animals that sees people expend considerable time and money protecting their pets from pain and suffering whilst simultaneously condoning "*the institutionalised exploitation*" and suffering of millions of other domestic animals in intensive farms and scientific procedures. He sees the property status of animals as the root of the problem because it permits humans to use domestic animals as their own resources. Satz adopts the "*interest-convergence*" principle from critical race theory and applies it to animal law arguing

that far from protecting animals, animal welfare law actually asserts our right to use animals and thereby authorises the many ways in which we harm them (2009, p. 69). For Satz, animal welfare laws exist only as far as protecting animal interests converge with human interests. Therefore, to say that the purpose of these laws is the protection of animals is fundamentally misleading as the real purpose is to assert our right to use the animals.

Some scholars advocate maintaining the current legal status of domestic animals (Cohen, 1997; Favre, 2004; Posner, 2004). For example, Favre suggests that there are clear benefits to retaining property status since ownership entails responsibility for the care of the animal (Favre, 2000). Being a property lawyer, he adopts the concept of dual ownership from the English concept of a trust of land. The owner of a legal estate in land is a trustee who accepts certain duties and responsibilities over the land for the benefit of the beneficiary who enjoys the equitable ownership. Similarly, Favre suggests that living property (animals) can be divided into its legal and equitable components with the pet-owner as a trustee (or guardian) accepting certain responsibilities and duties while the animal itself enjoys “*equitable self-ownership*” (2000, p.497). In this way, Favre seeks to blend the previously separated categories of property and legal person to allow domestic animals direct access to the legal system to protect their interests in equity. While an owner of a pet is already subject to legislation that prohibits him/her from causing unnecessary suffering to their animal, (s.4, Animal Welfare Act 2006 under English law) this duty is rooted in criminal law and is owed to the State. By making animals equitable self-owners, the legal owner has obligations owed directly to the animal. According to Favre, the nature of these duties arises primarily from two sources: firstly, legislative provisions prohibiting cruelty to animals and secondly, legal concepts that define the relationship between parents and children and which can be applied by analogy. Favre observes:

“Just as parents of the child must sort out what is in the best interests of their children, so the animal guardians must, in the first instance, decide what is in the best interests of the self-owned animal for whom they are responsible” (2000, p. 501).

Favre prefers the term guardian over trustee because it better reflects the fact that the owner of the equitable title (the animal) is also the subject matter of the legal title (held by the human) resulting in a “*blending of corpus and self-ownership*” that does not exist for a non-living asset trust (2000, p. 496). Whilst a trustee of property owes financial accountability to the beneficiary, the guardian of the animal has an accountability that is more in line with a parent-child relationship, based on ‘quality of life’ accountability.

Recently there has been a backlash against the property versus legal personhood debate due to the frustration caused by its inability to bring forth practical change in the lives of animals. The political theorist, Kymlicka, argues that using the “*property/personhood*

dilemma” is futile because the debate has reached a political impasse (2017, p. 124). He agrees with Satz that legal scholarship is trapped

“in a paralyzing debate about whether categorising animals as “persons” instead of “property” will improve their legal protections” (Satz, 2009, p. 66).

An alternative approach is needed to address this paralysis and in the context of protecting the human-companion animal relationship in housing law, a relational approach is here recommended.

1.8.2 A relational approach for companion animals

A relational approach addresses the legal treatment of animals based on their relationship to humans, for example, as family members (Donaldson and Kymlicka, 2011; Kymlicka, 2017) or kin (Fox, 2004). Fox (2004) challenges the arbitrariness of the existing legal divide based as it is on the fundamentally unstable binary of human/animal that designates all humans as legal persons and all non-human animals as property. She observes that legal protections for animals, for example, greater protections for cats and dogs under the Animals (Scientific Procedures) Act 1986, are determined by “*cultural and emotional attachment to certain species*” as opposed to reasoned analysis based on scientific evidence (2004, p. 473). She argues that we need to radically re-think our relationship with animals “*in ways which transcend property*” (2004, p. 489) and instead recognise animals as our kin. There is a recent example of the use of kinship to grant legal personhood to a non-human entity, a river, in New Zealand. In 2017, the Whanganui river was granted legal personhood based on the relationship between the Maori tribe of Whanganui and the river. Media reports observed

“hundreds of tribal representatives wept with joy when their bid to have their kin awarded legal status as a living entity was passed into law” (Ainge Roy, 2017).

The tribe consider the river to be an ancestor and it is the significance of this special relationship between the people and the river that was recognised under the law.

Donaldson and Kymlicka (2011) applied the political theory of group-differentiated citizenship to the debate shifting the focus from the intrinsic capacities of animals to their relationships to human political communities. They suggest that domesticated animals are co-citizens and as a matter of justice have rights to communal resources. Applying this political theory to law reform, Kymlicka calls for a

“social recognition strategy: getting domesticated animals included into everyday legal categories of social membership” (2017, p. 125).

He specifically identifies family membership as one of these legal categories. Therefore, companion animals would become family members at law without the need to change their property status nor declare them as legal persons. I concur with Kymlicka that implementing

a social recognition strategy is more politically feasible than pursuing legal personhood for companion animals in the foreseeable future. Whilst such an approach reinforces the objectification of animals by differentiating them on the basis of their use to humans, it is nevertheless a more politically feasible strategy for protecting the interests of companion animals. If judges are reluctant to extend legal personhood to great apes, nonhuman animals with cognitive capacity close to that of humans, it is unlikely that any such extension of legal personhood to cats and dogs will occur in the foreseeable future so arguments based on legal personhood for companion animals are “*politically unfeasible*” in the current climate (Kymlicka, 2017, p. 125).

There is precedent for treating animals differently at law depending on the social category allocated to the animal. For example, a dog can be a cherished companion animal living in a home or a test subject in scientific procedures in a laboratory. Its treatment at law differs depending on which of these categories it is assigned. This legal construct, of treating animals differently depending upon their use to humans, or more specifically, the relationship a human has with the animal, can be invoked to protect the human-companion animal in housing law and policy.

Section 1.5.1 of this commentary considered the origin of the legal status of domestic animals as property which is thought to lie in the domestication of animals and the move from hunter-gatherers to agriculturists. From his studies of hunter-gatherer societies Ingold (1994) theorised that hunters depend on establishing a continuing relationship with animals; a relationship, he suggests, based on trust. In contrast the agriculturist’s relationship with animals is based on domination. This shift from human-animal relations based on trust to those based on domination necessitated seeing animals as objects rather than as subjects worthy of respect. I am persuaded by Ingold’s theory and see this as providing the key to differentiating our relationship with companion animals from our relationship with other domestic animals and thereby justifying differential treatment at law. Statistically, in the USA, farm animals represent 98% of all animals with whom we interact (Wolfson and Sullivan, 2004) and it is likely to be a similar figure in England. Thus, the majority of human-animal relationships rely on the need for humans to dominate and use animals for our own purposes with little, or no, benefit to the animal, for example, intensively farmed animals are denied a natural environment and are killed prematurely. However, our relationship with companion animals living in our homes, is very different – it is a relationship based on trust. Tuan (2004) disputes this, suggesting that our relationship with pets is based on dominance but I am not wholly persuaded by his argument. In most cases, companion animals benefit from their relationship with humans (although some pets are abused by their owners). Owners do not need to harm the welfare of their animals for human benefit. On the contrary,

people often reap social and health benefits from the very act of fulfilling the companion animal's welfare needs. This is unique in the human relationship with animals and justifies a unique approach in law, one which both recognises and protects the human-companion animal relationship.

The mismatch between the legal status of companion animals as property and the way in which people socially construct their pets as part of their family has created difficulties in the courts leading to judicial creativity to overcome the dilemma. For example, the divergence of law and reality is visible in pet custody disputes which arise following a separation or divorce of a couple where both parties want the family pet to live with them. The courts have struggled at times to apply pure property law tests given the strength of the bond between the human and the companion animal (Rook, 2014, Portfolio component 1, 2.2). In some countries this has led to legislative changes to resolve the problem, for example, in 2017 Alaska amended its divorce law to require the courts to take the well-being of the pet into consideration in deciding pet custody disputes (Brulliard, 2017). Similar legal problems have arisen in the context of pet trusts and led to legislation in a number of US states to permit a companion animal to be a beneficiary under a trust (Favre, 2010; Aflatooni, 2011). Since property cannot be a beneficiary of a trust, this concession rests on relational justifications. These examples demonstrate changing judicial and legislature attitudes to inter-species relationality and show support for Kymlicka's proposal that a new ethic of membership should exist in the context of animal law reform. In England there is legal precedent for treating cats and dogs differently from other animals at law based on our sentimental attachment to the species (Fox, 2010). Under the Animals (Scientific Procedures) Act 1986 a project licence for scientific procedures using cats and dogs will be granted only where the purpose of the work cannot be achieved without their use or where it is not practicable to obtain other suitable animals (s.5C(4); Home Office, 2014, at p. 52). In England, dogs and cats are specifically bred for use in scientific procedures so have never been kept as pets. Nevertheless, they enjoy additional protection under the law based on "*sentimental prejudices*" (Fox, 2004, p. 493) arising from our longstanding relationship with the species as companion animals. My proposal that housing law should recognise and protect the human-companion animal relationship is more restrictive than this legal exception because any additional protection under housing law would be dependent on the dog or cat having a current relationship with a tenant. Once that relationship ends, for example, the tenant dies, the particular human-companion animal relationship ends and no longer enjoys protection under housing law and policy. Whoever takes over responsibility for the animal after the death of its owner will be under a positive duty to meet the welfare needs of the animal,

under s.9, Animal Welfare Act 2006, but this is a separate and distinct consideration to that of housing law protecting the specific human-companion animal relationship.

Fox argues for a radical change in the legal status of animals from property to kin (Fox, 2004) and may be critical of my proposal to give preferential treatment to companion animals. Whilst sympathising with her frustration at the arbitrariness of the legal treatment of animals, and a need for a radical overhaul of the human-animal binary in law, I nevertheless propose the differential treatment of companion animals based on our emotional attachment to them. I believe this to be the most viable means to expedite changes in the law that will protect the human-companion animal relationship within the housing arena. I recognise that such an approach may be criticised as favouritism, according a privileged status to certain animals that does little to destabilise the human-animal binary at law. Fox observes that such an approach

“runs the risk of entrenching [the boundary] more firmly” (2004, p. 480)

but I think this is less so in respect of companion animals. My proposal for legislation to regulate the use of ‘no pet’ covenants in order to protect the human-companion animal relationship is rooted more in human rights and animal welfare than animal rights philosophy for which it will be criticised but it is arguable that by protecting this relationship the law transcends the human-animal binary. The close, reciprocal bond, *“bordering on co-dependence”* (Fox, 2010, p. 41) between the human and their dog/cat deconstructs the human-animal boundary and in doing so allows people to see the companion animal, with whom they share everyday family practices in the home, as a family member sometimes even an intimate family member such as a child. This closeness with a nonhuman animal may ultimately lead to greater empathy and understanding for all animals.

Adopting a relational approach to companion animals has received support in the legal literature (Rook, 2014; Kymlicka, 2017; Rook 2018; Fox and Ray, 2019) with Fox and Ray (2019) advocating the use of human rights arguments arising from the recognition of companion animals as family members. Kymlicka (2017) provides a two-level model of animal rights based on justice for domesticated animals. This model incorporates relational or ‘group-differentiated’ rights, which vary depending on the animal’s relationship to humans and provide animals with positive rights to resources. My reliance on relational rights for companion animals does not go so far as to advocate positive rights to resources but does suggest that housing law, practice and policy should recognise and protect the human-companion animal relationship. The significance of the relationship to both the human owner and their companion animal, and the consequent harm caused to both by a forced separation, needs to be acknowledged and given appropriate weight. Under a relational

approach, it is the relationship itself that justifies the protection, not the species of the animal nor its legal status so there is no risk of opening the floodgates to wider claims relating to domestic animals in general. 'No pet' covenants threaten that relationship but also have wider consequences as evident in the existing literature on 'no pet' covenants.

1.9 'No pet' covenants in residential leases

'No pet' covenants that restrict or prohibit the keeping of companion animals in rental housing affect millions of tenants across the UK every year. Existing surveys suggest that approximately half of all private landlords exclude pets and whilst public authority landlords are generally more tolerant of pets, inconsistent policies exist across the social housing sector. Given the large numbers of the population affected by 'no pet' covenants, it is surprising to find so little academic research on the subject. There is a significant knowledge gap in the existing literature on 'no pet' covenants with very few articles published in peer reviewed academic journals and even fewer from a socio-legal perspective (see Portfolio component 2, 3.4, *Table 1 Academic articles on 'no pet' covenants from my literature review*). The majority of the articles focus on pet-owning tenants and explore the difficulties they face in finding rental housing that will allow them to live with their companion animal (Palluzi, 2013; Power, 2017; Graham *et al*, 2018; Graham and Rock, 2018). Rental insecurity was a key theme to emerge from the literature in addition to tenant perceptions of the low availability and poor quality of pet-friendly accommodation (Power, 2017; Graham *et al*, 2018; Graham and Rock, 2018).

Power's (2017) empirical research in Australia explored pet-owning tenants' sense of housing security and the ways in which living with a pet shapes the degree of security experienced by the tenants. The online survey (attracting 679 responses) was not explicitly about pet ownership but had a wider objective of understanding the decisions tenants made when choosing rental housing. The impact of pet ownership emerged as a theme leading to twenty-eight semi-structured in-depth interviews with pet-owning tenants. Power's findings highlight pet-owning tenants' perceptions about the low availability and poor quality of housing advertised as pet-friendly. Landlord perceptions about the possible risks associated with pets such as property damage and nuisance, together with a state housing policy that prioritized investor value over rental security for tenants, meant that the majority of private landlords excluded pets from their property. Housing shortages meant that landlords enjoyed a large pool of possible tenants from whom to choose at any time thereby robbing tenants of any bargaining power in negotiations. The low availability of pet-friendly rentals meant some tenants had to compromise on quality, cleanliness, location or cost of housing accepting sub-standard property in undesirable or unsafe areas. She found that some tenants were

prepared to accept high levels of risk to their rental security by keeping pets without their landlord's knowledge in breach of their tenancy agreement. In order to limit the number of visits from the landlord or letting agent, during which the pet had to be hidden, some tenants deferred reporting the need for property repairs jeopardizing the quality of the property and thereby disadvantaging both tenant as occupant and landlord as owner. The primary reason for failing to declare a pet was the perceived low availability and poor quality of pet-friendly housing and many of these tenants had experience of having being rejected for properties in the past due to living with a companion animal. Power concludes that pet ownership should be included as a relevant variable in future research on understanding rental security and a tenant's capacity to create and maintain a sense of home.

Graham *et al* (2018) interviewed 28 young adults with dogs to examine how dog owners navigate rental markets in Canada. The study confirmed the findings of Power's earlier research and demonstrated that pet-owning tenants in Canada faced similar concerns over rental insecurity as their counterparts in Australia. The concept of a "*cycle of rental insecurity*" was devised to demonstrate the difficulties faced by dog owners in searching, settling and staying put in pet-friendly rental housing (2018, p. 4). In searching for housing advertised as 'pets negotiable' the dog owners felt powerless in negotiations and invariably found landlords unwilling to accept dogs. This led to feelings of discrimination, especially for those caring for larger dogs or certain breeds such as pit bulls. The 'settling' stage arose once the tenant had found somewhere willing to accept their dog. As with the tenants in Power's study, the dog owners had to make "*compromises*" and accepted substandard quality housing in undesirable locations in order to secure housing with their dog (2018, p. 6). Money was an important issue for the participants, which is not surprising as many were University students. They complained of having to pay non-refundable pet fees as well as security deposits and in some cases additional pet rent but "*felt cornered to pay*" because they felt they had no other options (2018, p. 5). In 'staying put' the dog owners worried about rental security and whether any of the neighbours would complain about the presence of their dog resulting in their eviction.

Most research on 'no pet' covenants focuses on the experience of tenants, so Carlisle-Frank, Frank and Neilsen's (2005) study in the USA is significant because it explores the position of landlords and their reasons for seeing companion animals as undesirable occupants. Two-thirds of the respondents cited property damage as a concern with half citing noise nuisance. These concerns did not necessarily arise from direct experience of troublesome pets since 63% of the respondents had never allowed pets in their property (2005, p.69). That landlords frame pets as a risk is significant to understanding the prevalence of 'no pet' covenants in the private sector. A number of animal charities in the UK

including the Dog's Trust and Cat's Protection have sought to counteract this conceptualization of pet-owning tenants as a risk with campaigns such as 'Lets for Pets' and 'Purrfect landlords' which seek to highlight the advantages that landlords with positive pet policies can enjoy, for example, longer stays by tenants thereby avoiding extra costs (Carlisle-Frank, Frank and Neilsen, 2005; Palluzi, 2013; Graham *et al*, 2018). Graham *et al* (2018) also sought the perspectives of landlords towards pets but this Canadian study was limited to the views of landlords who permitted pets in their property. Therefore, the American research (Carlisle-Frank, Frank and Neilsen, 2005) is the only academic study to obtain data on landlord perspectives towards pets and 'no pet' covenants from landlords who exclude pets although reports on this issue have recently been published in England by two leading animal charities (Cats Protection, 2018; Battersea, 2019). Using an online survey, Graham *et al* (2018) acquired data from thirty landlords/property managers of pet-friendly housing. Although the survey focused on the positive aspects of being pet-friendly, it also included an open-ended question that allowed negative experiences to be shared, for example, one participant spoke of having to evict a tenant after neighbours complained of nuisance barking by a pet dog left for long hours. Their findings show that pet-friendly property usually receives more applicants than listings that prohibit pets and that pet-owning tenants tend to stay longer in their rentals which is advantageous to landlords in avoiding extra costs associated with changing tenants. All of the landlords/property managers in the study were pet owners themselves and recognized the strength of the human-companion dog bond and its importance to people. One of the participants said,

"We have always had pets; this in one reason we always rent to pet owners" (2018, p. 6).

Another participant said that dogs are *"part of the family"* and acknowledged that it would be *"devastating"* to have to give up a dog to obtain housing (2018, p. 6). Such comments demonstrate the importance of educating landlords on the character of the human-companion animal relationship as a familial relationship and the magnitude of the harm caused to tenants when asked to rehome their pets (this links to my third research question as set out in section 1.3). Landlords may be less willing to request that a companion animal be rehomed if they appreciate the significant harm that can ensue from such a request.

The literature on 'no pet' covenants and the law is very sparse with three articles examining the law in the USA and Canada (Huss, 2005; Campbell, 2009; Palluzi, 2013) and only two considering the law in England (Rook, 2018; Fox and Ray, 2019). My article (Rook, 2018, Portfolio component 1, 2.1) explores how housing law and policy could better recognise and protect the human-companion animal relationship. Using housing legislation in Canada (Ontario) as a useful case study the article advocates the need for legislation in England to

regulate the use of 'no pet' covenants (2018, pp. 39-40). It employs human rights law to argue that the human-companion animal relationship needs greater protection, advocating that the relationship comes within 'private life and family' (especially private life) under Article 8 of the European Convention of Human Rights (Rook, 2018, p.40). Fox and Ray (2019) also support a human rights approach and suggest reframing the definition of 'family' under human rights law to recognize the significance of the human-companion animal relationship and the role interspecies relations play in maintaining the health and well-being of older people. Their research focuses on the use of 'no pet' covenants/policies in residential and nursing homes for older people in the UK building on earlier research in this area from a psychology perspective (McNicholas, 2007). Fox and Ray apply vulnerability theory to show the precarious position of older people and their companion animals at the transitional moment of leaving their own home and moving into a residential or nursing home. The older person faces a loss of choice about whom to live with and a loss of autonomy, becoming a passive recipient of care services, while their companion animal, occupying "*a liminal position between person and property*" is vulnerable to rehoming or euthanasia (2019, p. 211). They suggest that this shared vulnerability can break down barriers (including species differences) in liminal care settings such as care homes, presenting opportunities for growth and fulfilment. Using a human rights approach enables an older person forced to rehome their companion animal when moving into a care home, to frame the separation as a form of family breakdown thereby allowing the possibility of human rights litigation as a means for redress.

My research is the first study to provide an in-depth critical analysis of the existing law in England affecting the use and enforcement of 'no pet' covenants. In recent years, several social media campaigns by pet-owning tenants highlighted 'no pet' covenants as a social problem and led to the submission of a public petition to the Scottish Parliament in 2018-19 calling for legislation to prohibit the use of the covenants. However, the paucity of academic research makes it difficult for politicians to engage in an informed debate. Further knowledge is needed on the impact of 'no pet' covenants on the relevant stakeholders. My research contributes to an informed debate by providing a detailed understanding of the lived experience of 'no pet' covenants for seven pet-owning tenants in the UK.

1.10 My research findings

My research seeks to understand the familial character of the human-companion animal relationship and the implications for housing law and policy within the context of multi-species tenancies in England. I use the term multi-species tenancy in recognition of humans and companion dogs/cats living together in rental housing constructing a shared family life

through the everyday practices within the home. I adopt the phrase 'more-than-human' family from the existing literature on pets as family (Power, 2008; Irvine and Cilia, 2017) to demonstrate how companion animals are actively engaged in *doing* family and are not merely passively moulded to fit a pre-existing human-centred family. I adopt a post-humanist approach that disrupts the traditional human-animal binary, to extend family to include dogs and cats as social agents but I am also conscious of the ever-present ambivalence that pervades human relations with animals. Companion animals are deemed family members by people but have a property status at law and thereby occupy a liminal position between minded persons and disposable objects.

My social constructionist worldview shapes how I see the social world; reality emerges from relationships and there are multiple realities that are relative, context dependent and socially constructed. To understand the lived experience of 'no pet' covenants for pet-owning tenants, I therefore chose qualitative research methods and used in-depth unstructured and semi-structured interviews that allowed the participants an opportunity to tell their own story in their own words. My research aims to generate 'truth knowledge' grounded in experience by delving deep into the tenant's meaning of their experience of 'no pet' covenants. To achieve this deep understanding, I conducted seven in-depth interviews with people who were or had been tenants of residential property in the UK and who had been adversely affected by 'no pet' covenants. I adopted a mixed analysis approach and analysed the interview data using thematic content analysis and, where appropriate, narrative analysis. The holistic nature of narrative analysis is especially useful in understanding complexity, context and temporality and led to additional findings from the interview data that were not evident from the initial thematic content analysis. A limitation of my research is that I only interviewed pet-owning tenants who were adversely affected by 'no pet' covenants and not landlords who benefit from the covenants. For this reason, my empirical research is best seen as a pilot study pathing the way for a more comprehensive study that recruits research participants from both sides of the debate on 'no pet' covenants. In the meantime, my research provides valuable understanding as to the character of the human-companion animal relationship and the magnitude of the harm 'no pet' covenants can cause to pet-owning tenants.

From my thematic content analysis, I identified three key themes: Agency; Social Support and Ambivalence (detailed in Portfolio component 4 "Analysis of interviews", 5.2 *Thematic Content Analysis: How people in the UK construct animals as family members in everyday practices*). The Agency theme embraces the notion of companion animals as minded social actors who actively participate in doing family through everyday practices and who influence household decisions, instigate detrimental changes to everyday practices and affect human-

human interactions (sometimes positively as a social lubricant and other times negatively as a source of conflict). My 'Social Support' theme encapsulates the animal as both caregiver and care-receiver and shows how companion animals are socially constructed as kin through the many ways in which they support the physical, mental and emotional well-being of their owners. The theme of Ambivalence recognises how the ambivalence that characterises our relations with animals in general may permeate our relations with companion animals. While the existing literature suggests that ambivalence may threaten the durability of the family status of a pet (Shir-Vertesh, 2012) my own findings found little evidence of this. Pet owners were willing to openly declare their companion animal as a family member and endured hardship to protect the relationship. Ambivalence to animals was at times evident in the words and actions of landlords and officials but this aroused feelings of anger and frustration in the tenants who felt entitled to have their relationship with their dog/cat taken seriously.

Using thematic content analysis to understand the lived experience of 'no pet' covenants for pet-owning tenants, five themes emerge from my seven interviews: Rental Insecurity; Lack of Choice; Powerlessness in Negotiations and Perceived Discrimination; Mental Health and Ambivalence (detailed in Portfolio component 4 "Analysis of interviews", 5.3 *Thematic Content Analysis: How people in the UK experience a 'no pet' covenant in their residential lease*). A particularly interesting finding from my research in the UK is the striking similarity in the experience of pet-owning tenants to those in Australia (Power, 2017) and Canada (Graham *et al*, 2018). All three studies found pet-owning tenants enduring similar forms of disadvantage and harm caused by 'no pet' covenants. All found evidence of tenants facing rental insecurity due to concealing their pets from their landlord in breach of a 'no pet' covenant and all found pet-owning tenants having to compromise on the substandard state of repair or poor location of the property due to the low availability of pet-friendly housing. These disadvantages, together with feelings of powerlessness in negotiations with the landlord over the question of pets, left pet-owning tenants feeling a sense of discrimination. The 'mental health' theme emerges as a significant theme in my research with many of the other themes linking to it. All my participants reported that the existence of the 'no pet' covenant in their lease had an adverse effect on their mental health causing stress, anxiety and in some cases, suffering and grief.

I drew on Michael's (2000) concept of a co(a)gency, thereby viewing the assemblage of human+animal+home+lease as the relevant subject for analysis. An original aspect of my research is the way in which it questions the research participants on both the role of companion animals in family practices and the effect of 'no pet' covenants. None of the existing empirical studies have taken this approach which I believe allows for a more

insightful understanding of the tenant's lived experience of 'no pet' covenants by acknowledging the character of the relationship the tenant shares with their companion animal. My sub-theme of 'Detrimental Changes to Everyday Practices' (within the Agency theme) is not considered in the existing literature examining pets as family but arose from my interview data as a significant theme in the context of 'no pet' covenants. Pet-owners endure detrimental changes to their everyday routines, for example disturbed nights and sleep deprivation, for the sake of their relationship with their dog or cat. This resilience to hardship for the sake of their pet is evident when pet-owning tenants are faced with 'no pet' covenants and choose to endure hardship, such as poor-quality housing (part of the Lack of Choice theme), rather than relinquish their companion animal. The link between the themes of Detrimental Changes and Lack of Choice arose because I viewed the co(a)gency of human+animal+home+lease as my research subject. In contrast to Shir-Vertesh (2012) and her concept of flexible personhood to explain dogs losing their family status as life changes occur, my findings demonstrate a very different outcome of life changes. When life circumstances changed, my participants suffered detriment and endured hardship for the sake of their companion animal and in rationalising these detrimental changes to their lives, they emphasised the importance of their companion animal and thereby affirmed their kinship ties. This had the effect of strengthening rather than terminating the animal's status as a family member.

Three themes emerge from my narrative analysis of the four stories I crafted from four of my interviews: Symbiotic Relationships; Hierarchy of Family Members and Harm Assessment (detailed in Portfolio component 4 "Analysis of interviews", *5.4 Narrative Analysis*). My narrative analysis demonstrates how the human-companion animal relationship is a dynamic, symbiotic relationship that benefits both parties and can interconnect the owner with other humans (for example, other family members or even a deceased partner). Bob was married to Margaret for 57 years and they shared a life together with their dog, Darkie before her death. There is a complexity present in Bob's relationship with Darkie that is indicative of a dynamic, reciprocal and social relationship that is intertwined with Bob's relationship with Margaret. Ambivalence arose as a theme from the literature review and the thematic content analysis of my interview data. While ambivalence can be seen in the treatment of some pets, evident from the large numbers left by their owners at rehoming centres each year, the findings from my narrative analysis identifies the concept of a Hierarchy of Family Membership as an alternative explanation. This theme emerged directly from my interview data and is not identified in the existing literature on pets as family. My research participant, Kate, gave up her two dogs for rehoming and I found her actions difficult to reconcile with her claim that the dogs were family members. Her actions could be

interpreted as evidence of ambivalence similar to Shir-Vertesh's (2012) research participants in Israel. However, the holistic approach of narrative analysis that recognises the importance of context and temporality, led me to interview Kate a second time, one year later, to discuss my interpretation of her experience and this resulted in understanding her actions as a hierarchical ranking of family members. The dogs were family members, but Kate positioned the welfare of her new-born baby and seven-year old child above the dogs, leading to her decision to rehome her dogs. Had the family consisted of just Kate, her husband and the dogs she would not have rehomed the dogs because she would have ranked the needs of the dogs above her own. Further research on how the concept of the Hierarchy of Family Membership applies to 'more-than-human' families is needed to test the efficacy of the concept. The final theme to emerge from my narrative analysis was Harm Assessment which proved to be an important finding in my empirical research because of its relevance to assessing the law (see section 1.10.1 below). In deciding to conceal their companion animals from their landlords, Kate, Lucy and Josh undertook a harm assessment of the situation. They judged that there was no harm to the landlord in keeping their pet in the property and thereby justified their decision to breach the 'no pet' covenant in their lease.

My research develops the existing literature (Rook, 2018; Fox and Ray, 2019) on the application of human rights arguments to the use of 'no pet' covenants and the depth of analysis with which I examine this is an original contribution to the field. Many people socially construct their pets as members of their family through everyday practices in the home and enjoy a socially supportive relationship with their companion animal that resembles socially supportive human-human relationships. This raises significant questions about the relevancy of human rights arguments which are analysed in section 1.6 above and the Portfolio component 5, 6.5.2.1 *Does the human-companion animal relationship come within private life and family under Article 8 ECHR?* In my commentary and portfolio, I construct a legal argument that the human-companion animal relationship comes within Art. 8, ECHR as either 'family' or 'private life' and consider the implications of this for housing law and policy.

Portfolio component 5 includes a detailed analysis of the law in England relating to 'no pet' covenants. Housing law is silent on the matter and leaves it to the landlord and tenant to negotiate the question of pets living in the property. In reality, this freedom of contract enables landlords to determine whether their tenants can live with a cat or dog. My in-depth analysis of the law is an original contribution to the field and is divided into two sections. Firstly, whether 'no pet' covenants constitute unfair terms under the Consumer Rights Act 2015 and secondly, whether landlords can terminate the lease and repossess the property where tenants are in breach of a 'no pet' covenant. My analysis found that a blanket ban on all pets is likely to be deemed unfair and consequently void, however, the current position is

uncertain and urgent clarification by the Competition and Markets Authority is needed. In respect of possession proceedings by public authority landlords, the application of the reasonableness test means that it is only in special cases that courts will refuse a possession order where a tenant is deliberately in breach of a 'no pet' covenant and intends to continue the breach by keeping their cat or dog. Case law shows that the socially supportive role of a companion animal can constitute a special case where expert medical evidence supports retaining the pet due to the tenant's specific health problems. Using my findings from my literature review and analysis of my interview data which shows that companion animals provide valuable social support and improve the physical and mental health and well-being of pet owners, I suggest that it is appropriate for the courts to protect the human-companion relationship for *any* tenant facing eviction for breach of a 'no pet' covenant and not just those with severe mental health problems. This can be achieved through a Harm Assessment within the reasonableness test.

1.10.1 A Harm Assessment: an analysis of harm

Harm Assessment is a key concept to emerge from my narrative analysis (detailed in Portfolio component 4 "Analysis of interviews", 5.4 *Narrative Analysis*). Kate, Lucy and Josh all carried out a harm assessment when deciding to conceal their pets from the landlord. My idea to critically analyse 'no pet' covenants through the lens of harm is an original contribution to the field and receives support from three relevant areas:

- (i) The analysis of my interview data from which harm emerges as a key theme. The fact that tenants perceive their companion animals as family members means they will endure hardship to protect that bond, such as living in poor quality housing, or face significant harm if forced to rehome their family member (see Portfolio component 4 "Analysis of interviews"); and
- (ii) The reasonableness test in possession proceedings in public sector housing in which harm is a relevant factor in the court's assessment of the reasonableness of granting the landlord a possession order (see Portfolio component 5, 6.5.1.3 '*The reasonableness test and an assessment of harm*'); and
- (iii) The proportionality test in human rights arguments, as applied to Article 8 and Art.1, Prot.1 ECHR in which a fair balance must be struck between the convention rights of the respective parties so that one does not suffer a disproportionate harm (see Portfolio component 5, 6.7.1.1 '*Human Rights Framework*').

The fact that courts carry out an assessment of harm in the reasonableness test and the proportionality test, both of which may apply to the use of 'no pet' covenants, strengthens my recommendation that a Harm Assessment approach is the appropriate means to assess the need for legislation to regulate the use of 'no pet' covenants. The idea of assessing the legitimacy of state interference with people's rights (in this case with a landowner's property rights) by reference to harm receives widespread analysis in existing literature. John Stuart Mill's 'harm principle' from 1859 continues to influence questions of legitimate state interference with a person's liberty. In *On Liberty*, Mill states:

"[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." (Mill, 1859, p.223).

Drawing on Mill's 'harm principle' to examine the moral constraints on legislative action in the field of criminal law, Feinberg addresses the question "*What sorts of conduct may the state rightly make criminal?*" (1987, p. 3). Adopting a "*presumptive case for liberty*" (1987, p. 9) in which liberty is the norm and legal coercion must always to be justified, Feinberg identifies harm to others as a morally relevant reason for enacting criminal law. As a proponent of Liberalism and antipaternalism, Feinberg is keen to restrict liberty-limiting (or coercion-legitimizing) principles to those circumstances where it can be justified by the need to prevent harm (or offense) to others. The limitation on the liberty of a landlord to control the use of his/her own property is in itself a harm. According to Feinberg the state is justified in invading citizens' interests in liberty only where a greater harm would result from a failure to interfere. The interest in liberty is an interest in having as many "*open options*" as possible (1987, p.207), for example, the option of landlords to decide whether to allow pets in their property or not. Although this is a matter for negotiation with the tenant, in reality, the state of the housing shortage means that the tenant's bargaining power is weak and any concept of negotiation between the two is illusory. If Parliament passes legislation to regulate the use of 'no pet' covenants and prohibit blanket bans, landlords will no longer be at liberty to include 'no pet' covenants – they lose their freedom to choose whether animals can live on their property or not but in doing so benefit pet-owning tenants who suffer harm from the use of 'no pet' covenants. Thus, the harm principle must provide some way of grading different types of harms on the basis of their seriousness. Virtually all human behaviour can affect the interests of others to some degree, but it is only where harm is substantial and avoidable that state intervention can be justified.

1.10.1.1 The question of consent

Mill's harm principle distinguishes between harm to others (later categorised as other-regarding harm) and harm to the agent himself (known as self-regarding harm). The general rule being that other-regarding harm justifies interference by the state in the form of liberty-

limiting legislation, whereas self-regarding harm does not. However, the concepts of other-regarding and self-regarding action have proved problematic in practice especially as they are not mutually exclusive with some actions being both which has led Saunders (2016) to suggest that the more important distinction is between consensual and non-consensual harm. By focusing on the question of consent, Saunders contends that Mill could have defended all the conclusions he reached without creating the difficult problem of delineating a self-regarding sphere. Saunders advocates that as a general rule interference by the state can be justified to prevent non-consensual harms but not to prevent consensual harms (although exceptions do exist). Since consensual harm does not usually justify interference by the state, could landlords argue that a tenant consents to rehome their pets when they accept a lease with a 'no pet' covenant and therefore any consequent harm is consensual? This raises the question of what counts as valid consent? Mill refers to consent being

"free, voluntary, and undeceived" (Mill, 1859, p.225)

and Feinberg identifies voluntary choice as being free from coercion or other manipulation, free from ignorance, mistaken belief and any temporary distorting circumstances (1987, p. 115). Feinberg's argument against the legality of voluntarily entering into a contract of slavery highlights the complexity around issues of consent, more recently examined by Shafer-Landau (2005) in relation to apotemnophiliacs (those who strongly desire to have their healthy limbs amputated). Whilst accepting that someone may consent to be a slave, there is a risk that such slavery contracts, if legal, may be abused,

"if we allow the institution of "voluntary slavery" at all, then no matter how stringent our tests of voluntariness are, it is likely that a good many persons will be wrongly permitted" (Feinberg, 1987, p. 79-80).

The safest option therefore is to presume non-voluntariness in cases of slavery contracts (and mutilation contracts, suggests Shafer-Landau). When considering the question of the voluntariness of a tenant's consent to a 'no pet' covenant and the harm it causes to both tenants and their families, the significance of the housing crisis in England and the unequal bargaining power between the landlord and tenant cannot be ignored. Arguably a tenant's consent to a 'no pet' covenant is illusory because the tenant has no real power to negotiate a lease that accepts their companion animal. The circumstances are such that there is no room for compromise in the negotiations about the pet – there is no half-way position that would satisfy both landlords who wants to exclude pets from their property and tenants who wants to live with their companion animal. Is there genuine consent to the 'no pet' covenant where a tenant feels he/she has no choice but to accept the covenant? My research participant, Kate, accepted the lease with a 'no pet' covenant because there were no other suitable properties in the area, and she did not want to uproot her young family or make

them homeless. The extensive use of 'no pet' covenants in the rental sector led her to see the covenant as a standard term in leases that would only be enforced if a pet actually caused damage or nuisance. Since her well-behaved dogs would not do this, she wrongly believed the covenant would not be enforced against her. Since her consent is borne from "*ignorance*" and "*mistaken belief*" and is the product of a housing shortage that constitutes a "*temporary distorting circumstance*" which distorts the lease negotiations, the question of the voluntariness of her consent is raised (Feinberg, 1987, p. 115). Is her apparent consent to the inclusion of the 'no pet' covenant genuine? The harm (in the form of having to relinquish her companion animals) is arguably not consensual since she did not believe that her consent to the covenant would lead to the loss of her dogs. Thus, the issue of consent is not simple. Shafer-Landau observed that the overall assessment of voluntariness is "*much more of an art than a science*" in which a variety of incommensurable factors are considered (2005, p. 190).

1.10.1.2 *The nature of harm*

Feinberg sought to placate the many critics of Mill's "*one simple principle*" (1987, p. 25) by a more in-depth critical analysis of the nature of harm within the harm principle thereby acknowledging its many complexities. He acknowledges that the word harm is "*both vague and ambiguous*" (1987, p. 31). To better understand a harmed condition, he identifies three senses of harm:

- (i) First sense - a derivative or extended sense in which any kind of thing can be harmed such as harm caused to property by smashing a window. A building cannot in itself be harmed instead "*our reference to their "harm" is elliptical for the harm done to those who have interests in the buildings*" (1987, p. 31). If a window is smashed in a derelict building and no person has an interest in the building, we would not say that the building was harmed.
- (ii) Second sense - harm that is "*conceived as the thwarting, setting back, or defeating of an interest*" (1987, p. 33). Interests are all those things in which a person has a stake and which are "*distinguishable components of a person's well-being*" (1987, p. 34). A person is harmed when their interest is setback by the invasion of another, for example, through the impairment of function.
- (iii) Third sense - this sense of harm is closely related to the second but is distinct and can sometimes be at variance with it. It refers to the way in which a person can harm another by treating them unjustly and thereby wronging them. Feinberg notes that,

“One person wrongs another when his indefensible (unjustifiable and inexcusable) conduct violates the other’s right, and in all but certain very special cases such conduct will also invade the other’s interest and thus be harmful in the [second] sense” (1987, p. 35).

Applying this to ‘no pet’ covenants, it is first important to recognise that where a tenant perceives their companion animal as a family member their interest is setback if they are forced to relinquish their dog/cat. My empirical research illustrates other ways in which the interests of a pet-owning tenant may be thwarted, for example, Bob having to move out of the care home where he lived or David having to refuse shelter and sleep on the streets in order to continue living with their dogs (see Portfolio component 4, 5.3.2.2 *The effect of ‘no pet’ covenants on tenants*). Therefore, the tenant is harmed in Feinberg’s second sense of harm but what of the third sense of harm? Is the invasion of the tenant’s interest by the use of ‘no pet’ covenants wrong *per se* or can the use of the covenants be justified? Feinberg articulated the need for the priority ranking of conflicting interests in difficult situations such as this where some harm is unavoidable. Pet-owning tenants suffer harm from the use of ‘no pet’ covenants and landlords may suffer harm by the restriction of such covenants meaning that harm seems unavoidable. In cases like this, the legal system must assess the comparative importance of different kinds of interests and prevent invasions of interests of high priority to protect interests of low priority. Feinberg uses this concept of priority ranking to identify wrongs (his third sense of harm),

“Legal wrongs then will be invasions of interests which violate established priority rankings” (1987, p. 35).

In this way any invasion of the interests of another that are justified by the priority rules are not legal wrongs even though a person may suffer a setback of their interest. In the context of ‘no pet’ covenants it is therefore crucial to determine the priority ranking of thwarting an interest in the continuance of a successful human-companion animal relationship as against the thwarting of an interest in the protection of physical property against potential damage or the protection of a pleasant neighbourhood in which to live.

“Invasions that are justified by the priority rules are not legal wrongs though they might well inflict harm in the nonnormative sense of simple setback of interest” (1987, p. 35).

In this way, Feinberg distinguishes harms (in the second sense of a harm being a setback to an interest) from wrongs (in the third sense of a harm as involving a violation of rights). He argues that the notion of harm in the context of the criminal law must “*represent the overlap of senses two and three*” meaning that only setbacks to others’ interests that are also

wrongs are legal harms (1987, p. 36). Therefore, a harm occurs when morally indefensible conduct sets back a person's interest and also violates their moral rights. This necessitates an examination of both the nature of interests and the nature of wrongs.

According to Feinberg, the interests of others are differentiated into firstly, welfare interests and secondly, ulterior interests. Welfare interests are fundamental interests affecting physical health and social and emotional well-being whereas ulterior interests are more nebulous being a person's individual goals and aspirations. Welfare interests are both extremely important as without them "*a person is lost*" but are also the more trivial being "*grossly insufficient for a good life*" (1987, p. 37). Ulterior interests, such as an aspiration to create a work of art, are generally not directly protected by the law. Research shows that companion animals can improve the welfare of their owners physically, emotionally and mentally due to the close bond between them (see section 1.5.2) therefore if a landlord is at liberty to exclude pets, the welfare interests of tenants may be adversely affected. Welfare interests are indispensable to the advancement of ulterior interests therefore ulterior interests can be harmed by invading one of the welfare interests needed as a pre-requisite for advancing the ulterior interest. Consequently, the fact that pets improve a tenant's welfare interests in terms of better health and emotional stability also improves the prospects of the tenant's ulterior interests. Thus, there is an integral link between the two. However, welfare interests are not violated unless they fall below a minimum level. As explained earlier, a legal harm is not simply something that causes a setback to the welfare or ulterior interests of others. Instead only wrongful harms can justify interference by the state. Feinberg advocates that a wrongful harm violates the moral rights of others in circumstances where there is no sufficient justification for that violation. Moral rights, such as the rights to life, health and economic sufficiency, arise from welfare interests because these interests are grounds for moral claims against others. Since Feinberg is concerned only with the criminal law, he restricts harm to that which is wrongful whereas Mill adopts a broader concept of harm that encapsulates harm where no rights are violated. My research relates to property law disputes which distinguishes it from Feinberg's work in the criminal law. Arguably I could rely on Mill's broader concept of harm without the need to establish that the tenant's rights are violated (in Feinberg's third sense of harm) but I argue that a tenant's family and private life rights are violated when forced to rehome a companion animal due to a 'no pet' covenant. Therefore, the harm to the tenant is a wrongful harm which according to Feinberg's stricter concept of harm would justify state interference in the form of legislation unless there is sufficient justification for this violation of the tenant's rights. Is the use of 'no pet' covenants justified as a means to protect the interests of landlords and other tenants? If the type of interests 'no pet' covenants protect are deemed more important than the interest

of the pet-owning tenant, the landlord is justified in invading the pet-owning tenant's interest. The tenant may have been harmed but not wronged in these circumstances. This reinterpreted harm principle means that legislators must rank interests in order of importance.

Therefore, once it has been established that pet-owning tenants are harmed by the use of 'no pet' covenants; harmed in the sense of suffering a detriment to their welfare and well-being within the context of a violation of their rights protecting their private life and family, then the application of Feinberg's theory necessitates assessing and comparing the differing harms to landlords and tenants since tenants may be harmed by the use of the covenants and landlords may be harmed by their prohibition.

1.10.1.3 Assessing and comparing harms

Feinberg devised "*mediating maxims*" (1987, p. 187) and "*supplemental criteria*" to help the hypothetical legislator employ a "*sensibly mediated harm principle*" (1987, p. 194) including:

- (i) the magnitude of the harm committed; and
- (ii) the probability of the harm occurring; and
- (iii) the relative importance of the harm; and
- (iv) the aggregative nature of the harm.

Each of these are relevant to my Harm Assessment approach to 'no pet' covenants.

(i) The magnitude of the harm

The magnitude of the harm caused by 'no pet' covenants to pet-owning tenants is a key focus of my empirical research and led to my conceptualisation of 'no pet' covenants as contributors of harm. Feinberg asks,

"how great must the harm be in order for the harm principle to warrant legal coercion to prevent it?" (1987, p. 188).

There must be genuine harm and not mere annoyance and inconvenience, and any harm must not be mere trivia. My empirical research demonstrates the magnitude of harm caused to pet-owning tenants by 'no pet' covenants. My participants gave numerous examples of the type of harm 'no pet' covenants can cause: Bob was forced to give up the care, support and companionship he enjoyed at his care home and move to a property in the private sector where he felt isolated, lonely and struggled to find adequate home support; Julia lived in poor quality housing including something she described as a shed in a garden; David refused shelter that excluded his dog, forcing him to sleep on the streets and Isabel gave up lucrative university scholarships. The examples of harm experienced by my participants

illustrate the magnitude of harm pet-owning tenants may suffer which in some cases had life-changing consequences for the tenant (see Portfolio component 4). The character of the human-companion animal relationship as a close, dynamic, supportive social bond that extends kinship ties (as discussed in section 1.6 above), means that pet-owning tenants suffer serious harm when they are forced to rehome their pets due to 'no pet' covenants. Kate experienced grief, guilt, regret, loss and anger when she had to rehome her dogs to avoid eviction (see Portfolio component 4, 5,4,2 *Kate – a story of loss*). The adverse impact on the mental health of pet-owning tenants emerged as a significant theme from my interviews. The legal status of domestic animals as property disguises the seriousness of the loss for the pet-owning tenant. Relegating the loss to mere property loss downplays the magnitude of the harm suffered by tenants.

As with Mill's 'harm principle', my Harm Assessment derives from a general utilitarian moral philosophy to maximize benefits and minimise harm, but Feinberg qualifies this simplified calculation to include considerations of fairness and wrongfulness. Justice requires that A be prevented from acting wrongfully towards B even though greater loss may ensue overall. According to Feinberg,

"Other things being equal, wrongdoers are less deserving of protection from harm (or the loss of benefits) than the innocent are – a consideration of justice that utilitarianism does not take into account" (1987, p. 189).

Although landlords do not act wrongfully in inserting a 'no pet' covenant in residential leases, is it fair to use blanket bans on pets thereby causing significant harm to responsible pet-owning tenants with well-behaved pets? Thus, the probability of harm becomes relevant.

(ii) *The probability of the harm*

In respect of the probability of harm, Feinberg expresses the inverse variation between magnitude of harm and probability as a formula,

"the greater the probability of harm, the less grave the harm need be to justify coercion; the greater the gravity of the envisioned harm, the less probable it need be" (1987, p.191).

The compound of magnitude and probability is the degree of risk. What is the risk of landlords suffering harm if legislation dictates a positive pet policy as a default position for all residential leases? The legislator must consider the independent value of the risk-creating action, which in this case is the benefit that 'no pet' covenants provide to landlords and other tenants. There is little research on the harm to landlords that a positive pet policy would entail, and the importance of further research is apparent. Research by the National Landlords Association found potential property damage to be the main reason landlords include the covenant in the lease (41%), followed by concerns about tenants leaving the

property smelling of animals (26%) and concerns about animals causing annoyance to neighbours (22%) (NLA, 2017). Similar reasons are cited in the Cats Protection research with 63% of private landlords citing potential damage to property, contents and garden as the reason for excluding cats from their property (Cats Protection, 2019). It is reasonable for landlords to want to protect the value of their property and to avoid nuisance claims from neighbours but the probability of harm has to be considered, for example, the same research found that 89% of private landlords who allow cats had not experienced any damage to furniture or fittings belonging to the landlord (Cats Protection, 2019). Other research found that, in the preceding five-year period, very few pet-friendly local authority landlords in London had needed to take action against pet owning tenants because of their pets (Battersea, 2018). The existing research suggests that serious harm to property is unlikely (Carlisle-Frank, Frank and Neilsen, 2005). Neighbouring tenants want a pleasant environment in which to live and therefore may benefit from 'no pet' covenants that prevent other tenants from keeping animals that may cause a nuisance, such as noise disturbance or faeces been left in public areas. However, many pet-owning tenants are responsible pet owners with well-behaved pets. Therefore, many landlords and neighbouring tenants will not suffer any harm from a positive pet policy and more research is needed to better assess the probability of actual harm to their interests. If the probability of harm is small and the majority of pet-owning tenants are responsible pet owners with well-behaved pets, then the degree of risk to the landlord's interests is small. In these circumstances, does the extensive use of 'no pet' covenants constitute a disproportionate harm to tenants?

There may be alternative ways to counteract any risk to landlords, for example, the insertion of a covenant in the lease requiring tenants to pay for any property damage. The use of a pet deposit (which would need to be drafted as an exception to the Tenant Fees Act 2019) could be permitted in any new legislation. The Dogs and Domestic Animals (Accommodation and Protection) Bill 2019-21 proposes to reduce the risk of harm to others by introducing a system for certifying tenants as responsible pet owners with well-behaved animals. In contrast, the probability of harm is high where pet-owning tenants, who see their companion animals as family members, are forced to rehome them. Unlike the availability of alternative strategies to reduce any risk of harm to landlords, none exist for the tenant required to relinquish ownership of their dog or cat. Feinberg's "*balancing strategy*" (Shafer-Landau, 2005, p. 14) ensures the harm-principle is sensibly mediated in practice. He demonstrates this by using an example of restricting a person's liberty to shoot a rifle randomly in the air,

"Against that negligible value [the actor's pleasure], the legislator must balance a substantial risk, itself compounded of low probability but high magnitude of harm" (1987, p.191).

On this basis he concludes that “*The scales will surely tilt sharply away from liberty*” (1987, p. 191). My Harm Assessment adopts a similar balancing strategy and my research findings on the type and magnitude of harm caused to pet-owning tenants suggests that on current evidence the scales tilt away from the liberty of landlords to control the use of their own property.

(iii) *The relative importance of the harm*

This links with Feinberg’s concept of the ‘priority ranking of conflicting interests’ discussed earlier. Both concepts apply to a category of cases that Feinberg identified as being genuinely problematic for legislators:

“... to prevent A from harming B’s interest in Y would be to harm A’s interests in X” (1987, p. 203).

The regulation of ‘no pet’ covenants falls within this category of problematic cases because to prevent landlords harming the interests of tenants in being able to live with their companion animals would be to harm the interest of landlords in being able to control the use of their own property. In hard cases such as this legislators must compare the relative importance of the conflicting interests. Interestingly, Feinberg provides an example that includes a dog barking and causing a nuisance, something clearly relevant to the use of ‘no pet’ covenants,

“In nuisance law, there is a conflict between the plaintiff’s interest in the peaceful enjoyment of his land and the defendant’s interest in keeping a hogpen, or a howling dog” (1987, p. 204).

However, the use of ‘no pet’ covenants does not guarantee an animal free neighbourhood as homeowners are free to live with companion animals and may keep cats or dogs that cause some annoyance to neighbours. Feinberg acknowledges that ultimately it is in the discretion of legislators to decide what weight to attach to conflicting interests as it is

“impossible to prepare a detailed manual with the exact “weights” of all human interests” (1987, p. 203)

detailing the extent and probability of their being affected by certain actions. However, he identifies certain “*procedures for interest-balancing*” (1987, p. 204) that supplement the use of the harm principle in these circumstances. Other things being equal, he argues, we should:

- (i) protect an interest that is certain to be harmed in preference to one where harm is conjectural; and
- (ii) prevent the total thwarting of one interest compared to a small invasion of another interest.

These principles can be used to help balance the conflicting interests of landlords and tenants in the context of 'no pet' covenants. For example, it is more certain that a pet-owning tenant will be harmed if they are forced to relinquish their companion animal than the landlord's property interests will be harmed if the animal is allowed to reside in the premises. Many dogs and cats are well-behaved and cause no damage to rental property nor neighbourhoods.

Feinberg defines harm as the setback of an interest

"but when interests of quite different kinds are invaded to the same degree, where is the greater harm? That depends, of course, on which of the two kinds of interest is the more important" (1987, p. 204).

This is especially relevant to 'no pet' covenants because the relative importance of the interests (protection of the human-companion animal relationship perceived as a familial relationship as against protection of property) is very different in reality although not in law given that both the pet and the house are deemed property. Feinberg identifies three ways interests can differ in order to help legislators decide the relative importance of conflicting interests: firstly, interests differ in their "*vitality*", secondly, in the degree to which they are reinforced by other interests and finally in their inherent moral quality (1987, p. 204). Vitality measures the extent of damage likely to be caused by harm to the interest. For example, damage to one's heart causes more harm to a person's health than an equal degree of damage to a less vital organ. Similarly, damage to a person's health and well-being causes more harm than an equal degree of damage to a person's property because welfare interests are usually the most vital ones. Feinberg's formula to assist in assessing the relative importance of conflicting interests is as follows:

"Where a standard person's interest of high vitality in his system conflicts with another standard person's interest of relatively low vitality in his system, then, other things being equal, the former interest can be deemed more important than the latter" (1986, p. 205).

It is not an easy task to categorise interests as more or less vital. There is a simplicity in advocating that a person's interest in protecting the human-companion animal relationship, a relationship that many owners perceive as family, is more vital than a landlord's interest in protecting his property from potential damage. Whilst it is acknowledged that damage to property may cause considerable stress to landlords there is always risk of some damage to rental property whether a tenant has a pet or not (hence the use of deposits). It is likely that protecting family relationships between humans would always trump protecting property. Should not any relationship sharing the central traits of family relationships and carrying out family functions (examined in section 1.6) be deemed more vital than an interest in property? Reliant on Feinberg's procedures for interest-balancing, I suggest that the human-

companion animal relationship should exert a substantial weight on the scales tilting them in favour of liberty restricting intervention (in the form of legislation regulating the use of 'no pet' covenants).

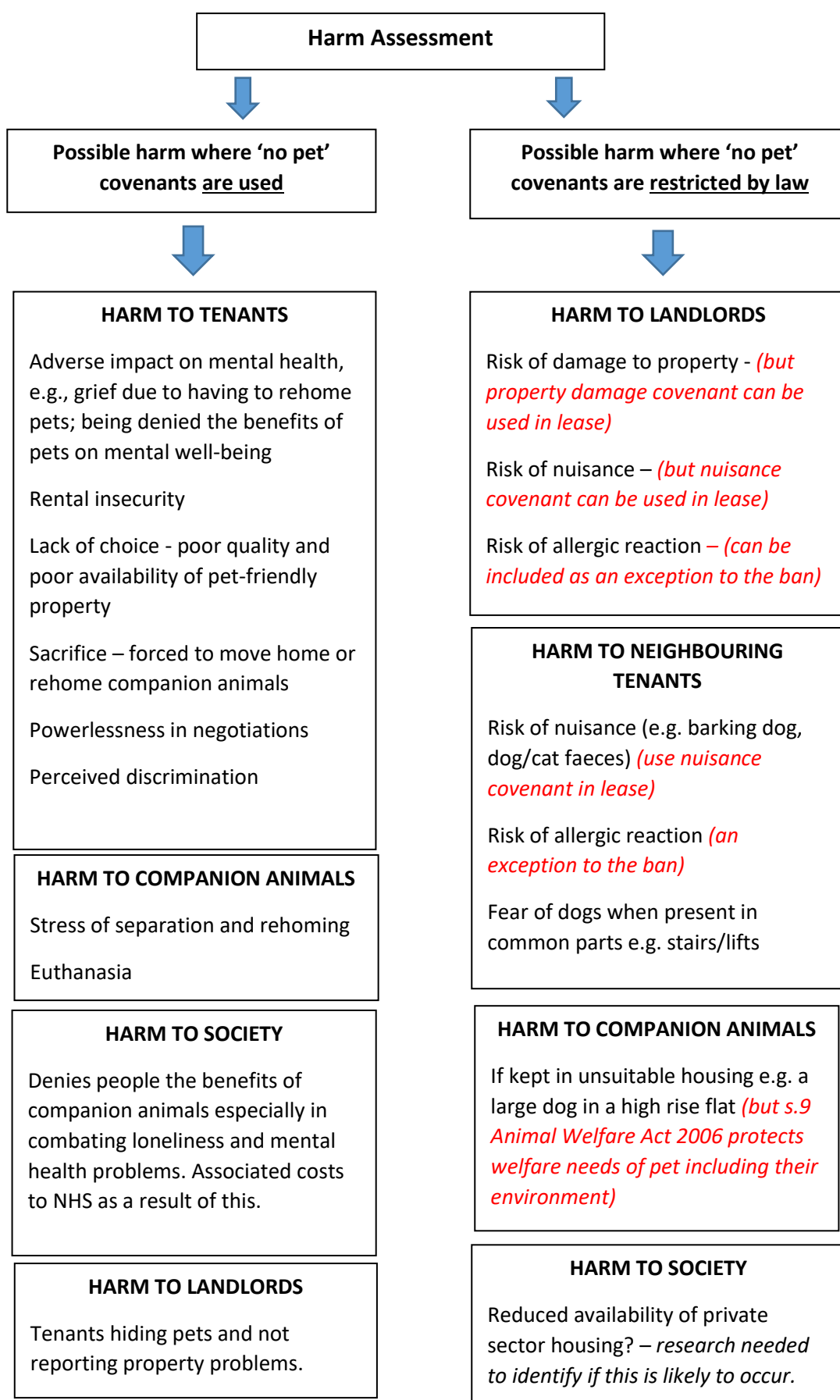
(iii) *The aggregative nature of the harm*

Feinberg acknowledges further complexities in determining the question of vitality due to the way in which

"Interests tend to pile up and reinforce one another" (1987, p. 205).

The fact that landlords are at liberty to exclude pets may make more property owners willing to let their property to tenants and thereby increase the housing stock available to the residential rental sector. There is also a community interest in not having dogs in the neighbourhood that act in a threatening manner or that leave faeces in public places. Conversely, dogs can increase social connectedness in local communities creating higher levels of social capital (Charles and Davies, 2014; Wood et al, 2017, Portfolio component 4, 5.2.4 *Affecting human-human interactions*) and there are benefits to society from the significant cost savings to the National Health Service from pet ownership (see section 1.5.2.2 above) and the boost to the economy from the lucrative pet industry. This demonstrates the complexity of the interest-balancing exercise caused by the build-up of reinforcing interests, both personal and societal interests. In a similar vein to Feinberg, my Harm Assessment includes reinforcing interests in the calculation of harm caused by 'no pet' covenants by taking into account the possible harm to tenants, companion animals, society and landlords. *Figure 3 'The Harm Assessment Approach'* identifies possible harms from the use or prohibition of 'no pet' covenants and indicates alternative ways to respond to that harm. In my opinion, *Figure 3* demonstrates that on the evidence of research to date, state intervention to regulate the use of 'no pet' covenants is justified on the basis of preventing significant harm to pet-owning tenants which outweighs any lesser harm to landlords or other tenants. Ultimately Parliament will need to assess the relative importance of these harm and therefore research on the character and magnitude of harm to all the stakeholders is vital to assist Parliament in making an informed decision.

Figure 3 - The Harm Assessment approach



1.11 My research findings on assessing the need for legislation

My final research question examines whether a change in housing law and policy in England is needed to regulate the use of 'no pet' covenants in residential leases to allow all residential tenants to live with well-behaved pets with exclusions only permitted in exceptional circumstances. The Scottish Parliament public petitions committee felt that there was no need for such legislation (November 2019) but I disagree and suggest that there are a number of changes in society over recent decades that mean that an assessment of the use of 'no pet' covenants is more pertinent now than in previous years and Parliament is the appropriate body to do this. The Scottish Parliament public petitions committee did not consider these changes in its decision. These changes are:

1.11.1 Changes in people's perception of pets as family

Many people now construct their companion animals as family members. This can be analysed through different models of family: firstly, one based on sharing similar traits to those existing in traditional nuclear family relationships; secondly, a function-based model of family that relies on the existence of everyday family practices in the home and/or caring practices (discussed in section 1.6 above). Therefore, there is a strong argument for recognising and protecting the human-companion animal relationship as a familial relationship within the context of housing law. In Portfolio component 5, 6.5.2.1 *'Does the human-companion animal relationship come within private life and family under Article 8 ECHR?'*, I argue that the character of the human-companion animal relationship falls within the meaning of 'private life and family' under Art. 8 ECHR. This is significant because it demonstrates the worth of the relationship and elevates its importance in society, especially to the judiciary and politicians. If, as I suggest, the human-companion animal falls within Art.8 then the question of legislation to regulate the use of 'no pet' covenants can be examined within a Human Rights Framework, and involves balancing the competing convention rights of tenants under Art.8 and landlord property rights under Art.1, Prot.1 (as detailed in Portfolio component 5, 6.7.1 *'Two Frameworks for Change'*). It is for Parliament to strike the correct balance between these competing rights in a way that ensures proportionality so that no one party suffers disproportionate harm.

1.11.2 Changes in the availability of research on the benefits of pet ownership

There is now an extensive body of research on the benefits of pet ownership which was not available as little as 30 years ago (which in the history of pet ownership is very recent). This research demonstrates the health benefits for individuals as well as benefits to the local community and wider society. The human-companion animal relationship is a socially

supportive relationship that can provide physical and mental health benefits and promote emotional well-being due to the close bond between the human and animal. This is especially important for people who are vulnerable such as the elderly or homeless (Enders-Slegers, 2000; Irvine, 2013a) or during difficult circumstances, such as lockdown during the coronavirus pandemic (Hunt, 2020). These health benefits have wider repercussions in terms of a reduced burden on health services, for example fewer visits to doctors (Siegel, 1990), providing significant cost savings for the National Health Service (Hall *et al*, 2017). The thriving pet industry, providing products and services for pet owners, also contributes to a healthy economy. I propose that this body of research on the benefits of pet ownership should play a role in assessing the need to regulate the use of ‘no pet’ covenants in England. Recent legislative and policy changes on ‘no pet’ covenants in Australia (Victoria) and New Zealand respectively were as a result of governing bodies recognising the significant health benefits of pet ownership. If the question of pets is left to the landlord and tenant to negotiate, these important factors will be ignored.

1.11.3 Changes in the housing sector

Recent changes in the housing sector mean that more people are now renting in the private sector and for longer periods of time, sometimes for life. For many people in England renting in the private sector is no longer a transitional stepping-stone to home ownership. Those renting for life will be denied the opportunity to live with cats and dogs if their private landlord prohibits pets (which almost half of all private landlords do). Housing shortages and austerity measures mean that tenants have no bargaining power in negotiating the question of pets. A number of my participants experienced powerlessness in negotiations with landlords over the presence of pets. Landlords can dictate the terms of the lease knowing that if a pet-owning tenant is not happy with the ‘no pet’ covenant in the lease, the landlord can simply find another tenant. There are more ‘small-time’ private landlords in England than ever before. These relatively affluent individuals own two or three houses for investment purposes which are let to tenants. These private individuals are motivated by protecting their investment and are unlikely to take into account the improved benefits to tenants’ well-being in living with a companion animal nor the benefits to wider society. It is for Parliament to take these wider considerations into account. In Portfolio component 5, 6.7.1 ‘*Two Frameworks for Change*’, I present a Fair Housing framework that embraces fairness between the parties within the context of a Harm Assessment. The framework guides Parliament in balancing the disparate rights of all those affected by ‘no pet’ covenants – tenants, landlords, companion animals and society – to ensure fairness between the parties. On the basis of current evidence, I envisage that such an assessment of harm will favour the enactment of

legislation to regulate the use of 'no pet' covenants that permits responsible pet-owning tenants to live with well-behaved pets.

That tenants in the UK, Australia (Power, 2017) and Canada (Graham *et al*, 2018) all have a similar harmful experience of 'no pet' covenants is interesting, given that states in both Australia and Canada have enacted housing legislation to restrict and regulate the use of 'no pet' covenants. This legislation provides a useful example of the way legislation in England could be drafted to restrict the use of the covenants and thereby allow tenants to live with well-behaved pets while simultaneously protecting the interests of landlords and neighbouring tenants against property damage and nuisance. In doing this, any such legislation would be compliant with the Human Rights Act 1998 by preventing disproportionate harm to either landlords or tenants.

The dominant cultural framing of 'good pet ownership' requires a lifelong commitment to the companion animal (with dogs living an average of 12 years and cats for longer) but the current law does nothing to prevent the use of 'no pet' covenants and thereby allows landlords to require pet-owning tenants to relinquish their companion animals. There are clearly conflicting messages at play between pets as disposable property in the field of housing and good pet ownership as a lifelong responsibility. By acknowledging the link between housing policies and responsible pet ownership policies the government is encouraged to address this conflict through regulating the use of 'no pet' covenants.

My research suggests the need for a reconceptualization of 'no pet' covenants from *controllers of risk* to *contributors of harm*. Currently pets are conceptualised by landlords and their agents as a risk especially to property due to the potential damage pets may cause to fixtures and furnishings (Carlisle-Frank, Frank and Neilsen, 2005). Consequently, pet-owning tenants are perceived as problematic. Such views arise and perpetuate due to cultural conceptions of pets, especially dogs, as polluting, unhygienic, disruptive and unruly (Serpell, 1995). Perceiving pets in this way justifies landlords in excluding them from their property through using 'no pet' covenants as a controller of risk. If pets are excluded the risk of damage by pets, however unlikely in practice, is eliminated. I advocate that cultural changes over recent years in how owners perceive their pets, especially as family members, warrants problematizing the use of 'no pet' covenants as a contributor to harm. My findings therefore support the case for changing the way 'no pet' covenants are perceived from being seen in a positive light as controllers of risk to being seen negatively as contributors of harm. This reconceptualization supports the need for Parliament intervention. The Government has recently stated its proposal to change the Model Agreement for an Assured Shorthold Tenancy in the private sector to allow tenants to keep well-behaved pets, recognising the

health benefits of pet ownership (MHCLG, 2020a). However, few private landlords use the Model Agreement, so these changes are unlikely to have a noticeable impact without the force of legislation to require compliance.

1.12 Future research

My Harm Assessment approach necessitates a priority ranking of conflicting interests but to do this there needs to be reliable data on the harm suffered by the relevant stakeholders. My empirical research provides evidence of the harm suffered by seven pet-owning tenants due to the use of 'no pet' covenants and this is valuable in calculating the magnitude of the possible harm to tenants. Further research, using my findings as a starting point, would be useful to gather data on a larger sample of tenants as this could provide information about the probability of harm to tenants. Understanding the harm to landlords and neighbouring tenants that can result from a legislative restriction on the use of 'no pet' covenants is identified as a significant area for future research. The existing literature is very limited, so it makes an ideal area for post-doctoral research enabling me to build on my DLaw research.

2 PORTFOLIO COMPONENT 1 – my relevant publications

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2.1 For the Love of Darcie: Recognising the Human–Companion Animal Relationship in Housing Law and Policy

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Abstract This paper identifies the law’s failure to recognise and protect the human–companion animal relationship in the housing arena. The nature of the human–companion animal relationship has striking similarities to human–human relationships in the socially supportive aspects of the relationship such as attachment, nurturance and reliable alliance. This contributes to the social life and sense of well-being of the owner. There is also evidence that the human–companion animal relationship can have physical health benefits such as lowering the risk of death by cardiovascular disease. It is clear that society benefits from the human–companion animal relationship, which many owners perceive as akin to family, in the form of healthier, less isolated people with better social networks. Yet in the key area of housing, the law does nothing to protect or even recognise this relationship. In consequence, every year thousands of tenants in both the public and private sector are faced with ‘no pet’ covenants in their leases and grapple with difficulties such as reduced housing options, higher rents or the traumatic decision to give up their companion animal for rehoming or euthanasia. This is especially prevalent amongst vulnerable people, like the elderly and mentally ill, who are more likely to need to move into supported accommodation. This article examines housing law in countries, such as France and Canada, that prohibit ‘no pet’ covenants in residential leases and provides arguments for the effective formulation and implementation of such law in the UK.

Keywords Human–companion animal relationship · Housing law · ‘No pet’ covenants · Companion animals · Pets · Human rights

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A Case Study: Bob and Darcie

In April 2017 Bob, an 87 year old man from Scotland, left his residential care home after being threatened with eviction. He had been faced with a difficult choice—give up part of his family or give up his home. He chose, as many would, to keep his family together and leave his home. His family consisted of his companion animal, Darcie, a 10-year old Schnauzer dog whom Bob and his wife, Margaret, had taken into their lives and home as a puppy. To Bob, Darcie was part of the family and

when Margaret died in 2014, Bob and Darcie became the only remaining members of the family unit. The strength of Bob's sentiment towards Darcie is displayed in his words "He means everything to me. Everything. He's my life now".¹ Bob was forced to give up his home at the residential care home where he enjoyed the benefits of security, home support, meals and a sense of community with the other residents. For the love of Darcie, he gave all this up, and moved into private rental accommodation, based on the strength of the relationship he shared with his dog. A relationship that is currently ignored by housing law and policy.

This article argues that legislation is needed in the UK to prevent landlords of residential properties from banning pets. The article proposes using an existing legal concept, that of treating animals differently at law depending upon how we *use* them, as a precedent for treating animals differently depending on *the nature of our relationship* with the animal. The article examines the origin of the legal status of domestic animals as property in order to differentiate our relationship with companion animals from our relationship with other animals based on notions of trust and domination. The article then examines some of the beneficial effects of a close relationship with a companion animal on the health and social well-being of the owner. To better understand how housing laws in the UK could protect our relationship with companion animals, the article examines legislation in other jurisdictions that prohibits landlords from having 'no pet' covenants in residential leases. Finally the article examines human rights law. Relying on the social nature of the relationship with pets and the physical and psychological benefits flowing from this relationship, and using human rights case law from Belgium as an example, the article argues that the human-companion animal relationship falls within Article 8 of the European Convention of Human Rights and considers the implications of this on housing law and policy in the UK.

The Human-Companion Animal Relationship

The scholarly discipline of human-animal studies seeks to understand how animals are socially constructed. Once an animal is incorporated into the human social world, it is assigned a category, usually based on how it is used by humans.

This social category is more important than the biology of the animal in determining the status and treatment of the animal including at law (DeMello 2012). For example, a rabbit's biology classifies it as a member of the species *Oryctolagus cuniculus*, but the treatment of the rabbit under English Law depends upon its use: is it a pet rabbit? (protected by the Animal Welfare Act 2006); or a rabbit bred for meat? (in which case the Welfare of Farmed Animals (England) Regulations 2007 also apply); or is it a rabbit used in scientific procedures as an experimental test subject? (which would exclude the provisions of the Animal Welfare Act 2006 and instead apply the Animals (Scientific Procedures) Act 1986) or is it a wild rabbit? (which is deemed a pest and generally excluded from the protection of the law unless under the permanent or temporary control of a person). Consequently, it is the social category bestowed upon the rabbit that determines its treatment under the law. It is here suggested that this legal construct, of treating animals differently depending upon their use to humans, can be invoked to protect our relationship with companion animals. To do this, we first need to recognise the unique relationship humans share with their companion animals, which is akin to family (Serpell 1996; Franklin 2006; Charles and Aull Davies 2008). I use the word 'companion animal' to differentiate those animals kept primarily for social or emotional reasons from those kept primarily

¹ Elderly people in struggle to keep pets in care homes, says charity. BBC news report, 9 January 2017. <http://www.bbc.co.uk/news/av/uk-38553330/elderly-people-in-struggle-to-keep-pets-in-care-homes-says-charity> (accessed 2nd November 2017).

for economic or work purposes (Serpell and Paul 1994). The term also better reflects the change in our relationship with these animals over the last 50 years, for example, dogs used to sleep in a kennel outside the house rather than in the owner's bedroom. Franklin suggests that it was "after the 1970s that 'pets' changed to 'companion animals'" (Franklin 2006). I use the word 'family' tentatively, aware of its limitations just as others have done in the context of research on lesbian, gay and bisexual relationships. The rise of the LGBT community led to new forms of relationships and the concept of 'families we choose' (Weston 1991). In her article 'My Friends are my Family', Westwood observes, "We simply do not as yet have a vocabulary to describe these new relationship forms" (Westwood 2013) so she uses 'friendship' in her article whilst recognising its limitations. Similarly, with companion animals we can observe the strength of the bond between an owner and an animal whilst acknowledging the limitations of labelling this relationship as family. This term is heavily laden with human associations and is not ideally suited for the unique relationship we share with companion animals but in the absence of alternative appropriate vocabulary, the terminology is borrowed with the caveat that companion animals are akin to family rather than being family. However, this distinction is undoubtedly very subtle and many owners, like Bob, will perceive their companion animal as a member of the family for everyday living purposes.

Westwood argues that for many people, particularly in later life, friendships can be the most significant relationships, more important than family relationships (Westwood 2013). Yet in key areas of law and social policy, such as welfare benefits and medical decision-making, friendship is not recognised by the law. She argues that the law needs to keep pace with changing relationship forms and considers how its failure to do so impacts on equality for older people. There are parallels here with the relationship people develop with their companion animal and the failure of the law to recognise this relationship in the important area of housing.

Companion animals are deemed property at law. There is a mismatch between their legal status as property and the way in which people socially construct their companion animal as part of their family. To use Bob's words, Darcie is "my life". These are powerful words to describe a relationship that in law is classified as property. This divergence of law and reality has also been noted in the context of pet custody disputes that can arise following a separation or divorce of a couple where both parties want the family pet to live with them. The courts have struggled at times to apply pure property law tests given the strength of the bond between the human and the companion animal (Rook 2014). By understanding the origin of the legal status of domestic animals as property, it is possible to differentiate our relationship with companion animals from our relationship with other animals. Statistically, in the USA, farm animals represent 98% of all animals with whom we interact (Wolfson and Sullivan 2004) and it is likely to be a similar figure in England. Thus the majority of human-animal relationships rely on our ability to use animals for our own purposes with little, or no, benefit to the animal, for example, intensively farmed animals are generally denied a natural environment and are killed prematurely and animals used for scientific procedures can be subjected to pain and suffering. However, our relationship with companion animals, such as the cats and dogs living in our homes, is different. In most cases, the companion animals benefit from their relationship with us. We do not need to harm their welfare for our own benefit. On the contrary, we often reap social and health benefits from the very act of fulfilling the animal's welfare needs. This is unique in the human relationship with animals and justifies a unique approach in law, which both recognises and protects the human-companion animal relationship.

The Origin of the Legal Status of Domestic Animals as Property

In the history of our relationship with those animals that we eat there have been conflicts and contradictions, arising from our desire to use the animals as utilitarian objects whilst simultaneously recognising them as sentient beings capable of pain and suffering. By tracing the history of this conflict and exploring human defence mechanisms and coping strategies, developed over time to defuse or hide the conflict and assuage any feelings of guilt or discomfort, it is possible to understand the origin of the property status of companion animals and thereby highlight its inadequacies.

The origin of the legal status of domestic animals as property is thought to lie in the domestication of animals and the move from hunter-gatherers to pastoralists. The beginnings of livestock husbandry is dated approximately 9000 years ago starting with sheep and goats (Clutton-Brock 1994). However, our relationship with dogs is much older. The conventional view is that humans first domesticated their hunting partner, wild wolves, 10–20,000 years ago (Davis and Valla 1978; Beck and Katcher 1996), however some suggest that it was much earlier, approximately 100,000 years ago (Morell 1997). Using selective breeding to encourage the characteristics we desired—playfulness, subservience, dependence—dogs are the creation of humans. Beck and Katcher suggest “Our affection for dogs may simply be a way of expressing the love that a creator has for his or her creation” (1996: 171). They hypothesize that “the relationship between dogs and people is rooted in the evolution of both” (1996: 176). Given the long history we have with dogs, it is not surprising that dogs are our most popular companion animal and the animals with whom we develop some of our strongest bonds.²

Studies of pets in primitive societies hint at a significant paradigm shift as humans progressed from hunter-gatherers to agriculturists. Ingold adopted an ‘indigenous perspective’ to understand our domestication of animals that were once wild. He sought to shed the dichotomies of ‘wild versus domestic’ and ‘nature versus humanity’ traditionally used in the West to tell the story of the history of our relationship with animals, and instead sought to understand the nature of the relationship between hunter-gatherers and animals from the perspective of the indigenous people (Ingold 1994). From their perspective, the natural world is not separate from, and inferior to, the human world. It does not have to be conquered or controlled. Instead, animals are fellow inhabitants of the same world as humans. Serpell observes that there is much consistency in how hunter-gatherer societies view animals as rational, sentient and intelligent beings with spirits or souls that can survive the body after death (Serpell 2000). For example, the Cree Indians of Northern Canada believe that animals intentionally present themselves to the hunter to be killed and on death the soul of the animal is released to become flesh again (Tanner 1979; Ingold 1994). The hunter must be respectful and not wasteful or the animal will remember the transgression and not present itself in the future. This means that the success of the hunter depends on establishing a continuing relationship with the animals; a relationship, Ingold argues, based on trust. For him “The essence of trust is a peculiar combination of autonomy and dependency” (1994: 13). The hunter is dependent on the animal and takes a risk that the animal, as an autonomous being, will act in the interests of the hunter and present itself to be killed. In return, the hunter is respectful of the animal; but this egalitarian moral ideology was clearly incompatible with the shift to agriculture and the domestication of farm animals for meat. According to Ingold the relationship the pastoralist has with animals is based on

² In 2017, 24% of households in the UK owned a dog compared to 17% of households with a cat. The total population of pet dogs was 8.5 million dogs compared to 8 million cats. Pet Food Manufacturers’ Association (PFMA) survey, 2017. <https://www.pfma.org.uk/pet-population-2017>. Accessed 4th January 2018.

domination not trust. The animals are selectively bred to be dependent on humans and therefore are unable to exercise their own free will to present themselves to die. The animals have no control over their lives. This shift from human–animal relations based on trust to those based on domination necessitated seeing animals as objects rather than as subjects worthy of respect. Ingold observes that, “Domestication can be said to exist when living animals are integrated as objects into the socio-economic organisation of the human group” (1994: 6). Thus, the advent of domestication of animals was dependent not just on biology but also on culture. Biology enabled us to adopt artificial selective breeding techniques to modify animals into what we wanted and culture enabled us to own the animals as property through the development of law and government. Arluke has explored the conflict in the treatment of animals in contemporary society—the fact that we shower our pets with love and treat them as one of the family but exploit and kill other domestic animals as utilitarian objects. He observes that “As with any cultural contradiction, these attitudes are built into the normative order, itself perpetuated by institutions that provide ways out of contradictions by supplying myths to bridge them and techniques to assuage troubled feelings” (Arluke 1994: 145). Thus our legal institutions, that objectify animals as property on a par with inanimate things, serve to justify our use of animals and relieve any associated guilt.

The problem is that the law applies the same legal status to animals in two very different situations. Our relationship with farm animals is based on domination but our relationship with companion animals is based on trust. Interestingly, Medieval England recognised this distinction and was fearful of it. During the witch hunts of the sixteenth and seventeenth centuries, legislation was passed in England creating the crime of ‘necromancy’ and the concept of a witch’s familiar was introduced (Hole 1977). In many of the witchcraft cases brought to trial in England, the accused was implicated by keeping companion animals (Serpell 1996). Cohen’s study of the medieval perception of animals demonstrates the importance attached to humanity’s separation and distance from animals. She notes how “The search for perfect humanity consisted in distancing oneself as far as possible from the animal [world]” (1994: 61). Due to the popularity of this view at the time of the witchcraft hunts, the closeness of the relationship between the human and their companion animal offended society. Serpell observes that “it was claimed that people were debased or dehumanized by the act of co-habiting on such egalitarian and intimate terms with animals” (1994: 134). A relationship with domestic animals based on domination and superiority was acceptable, for example, keeping pigs for meat, but a relationship with a domestic animal, such as a cat living in the home, based on trust and equality was perceived as dangerous and consequently demonised.

Clearly, we have moved a long way from the medieval witch hunts and their antiquated laws. Nowadays, many people share their homes with companion animals even their most personal and private spaces, such as their bedrooms and their beds. Yet whilst medieval laws at least appeared to recognise a distinction between the different relationships we had with animals based on domination or trust, the current laws show a distinct inability to differentiate these. The failure to acknowledge the close and unique bond some humans have with their companion animals is damaging to both humans and animals. The traumatic experience in 2017 of an 87-year old man having to leave his secure home in order to keep his beloved companion dog illustrates the need for urgent change.

The Benefits of the Human–Companion Animal Relationship to Individuals and Society

There are many disadvantages for those individuals living with a companion animal including the significant financial costs of food, veterinary care and insurance; time spent caring for the animal

which can be significant especially for dogs; cleaning up after the animal; concern arising from their destructive or anti-social behaviour; emotional distress when the animal is ill or dies; risks of bites, allergic reactions or other illnesses carried by the animal (Plaut et al. 1996). Companion animals provide no economic benefit, so given the significant disadvantages associated with them, what motivates people to acquire and keep a companion animal?

Developing Social Relationships Through Living with a Companion Animal

Obtaining a companion animal provides an opportunity to form a new social relationship and is a means of extending a person's network of relationships (Harker et al. 2000; Bonas et al. 2000). Using Weiss' theory of relational provisions (Weiss 1974), Harker et al. examined whether the function of the human–companion animal relationship was in part determined by relational provision available from other social relationships. Weiss identified six categories of relational provision that provide an adequate social life and sense of well-being: Attachment; Social integration; Opportunity for nurturance; Reassurance of worth; a sense of reliable alliance and Obtaining of guidance. Weiss argued that individuals need to maintain a number of different relationships to ensure all the relational provisions are met. Harker's study used a 'pet ownership questionnaire' to examine Network of Relationship Inventory ratings (Furman and Buhrmester 1985) from two groups of adults: those who were seeking to obtain a pet and those who were not. It found that participants seeking to acquire a pet had expectations of positive relationship-like provisions—such as companionship, friendship, affection—which they believed would result from keeping an animal. The study found that “high levels of negative relational provision appear to be associated with the desire to own a pet” (2000: 206). Therefore, negative relational provision—conflict, antagonism and punishment—in human–human relationships may increase dissatisfaction with current life circumstances and acquiring a pet may be one strategy adopted by people to compensate for inadequacies in human–human relationships. However, a study by Bonas et al. which also used a survey based on Furman's Network of Relationships Inventory and Weiss' theory of relational provisions to investigate whether pet ownership can be usefully conceptualized as a social relationship, found no evidence to support the idea that pets are used to 'plug the gap' where social provisions are lacking in human–human relationships; “The idea that pet owners use provisions from pets to compensate for shortcomings in other human relationships does not receive support from this study” (Bonas et al. 2000: 233). Couples and families with children are just as likely to own a pet than single people adding support to the view that pets do not substitute human relationships but complement and augment those relationships (Serpell 1996; Beck and Katcher 1996).

The study on social relationships by Bonas et al. gathered data on the participant's relationship with their immediate human family as well as their relationship with their pets so that the data between the human–human relationship and human–companion animal relationship could be compared. The study found striking similarities in the nature of the relationships which adds “empirical weight to the view that human–pet relationships are similar in nature to human–human relationships and, perhaps more specifically, that the supportive aspects of the two kinds of relationships are broadly similar” (Bonas et al. 2000: 219).

Further studies have also used Weiss' conceptual framework of social provision to make sense of the human–companion animal relationship in different population groups especially vulnerable groups such as the elderly (Enders-Slegers 2000) or the homeless (Irvine 2013). Enders-Slegers' study, which examined the bond between the elderly and their companion animals, identified the most important social provision derived from the relationship as 'attachment' followed by the 'opportunity for

nurturance’ and ‘reassurance of worth’ (Enders-Slegers 2000). Another study examined the human–companion animal relationship amongst people living with HIV in Australia and found support for the claim that companion animals can benefit an owner’s emotional, physical and social life by fulfilling one or more of Weiss’s six social provisions for psychological well-being (Hutton 2015). Hutton suggests that “a person’s *belief* in their animal’s supportive presence may be sufficient to “buffer” negative life challenges” (2015, 211). What is significant, therefore, is how a person perceives their relationship with the animal.

These studies suggest that it is the relationship with the companion animal that motivates people to acquire and keep the animal. This social relationship provides relational provision especially attachment, nurturance and a sense of worth, which contributes to an adequate social life and sense of well-being. The benefits people enjoy as a result of the social relationship with their companion animal outweigh the significant cost of keeping the animal in their home. The reach of these benefits goes beyond the owner and the companion animal; research has demonstrated the “ripple effect” of companion animals on wider neighbourhood interactions and a sense of community (Wood et al. 2007).

The Health Benefits of the Human–Companion Animal Relationship

Since Friedmann’s ground breaking research in 1980 that discovered that pet owners had better survival and recovery rates 1 year after discharge from a coronary unit than non-pet owners (Friedmann et al. 1980), there have been many studies attempting to measure the effects of pet ownership on health (Serpell 1991; Anderson et al. 1992; Friedmann et al. 2000, 2013; Levine et al. 2013). The most recent research is a comprehensive study in Sweden involving 3.4 million people over a 12-year period (Mubanga et al. 2017). The study found that owning a dog lowered the risk of dying from cardiovascular disease, especially for single people who experienced a significant reduction in the risk of death from the disease.

It is likely that it is the relationship people have with their pet that is significant to any physiological and psychological health benefits. It is because we socially construct the relationship as akin to family that the animal can protect our health and well-being. Mubanga’s study suggests that the social support that emanates from a close bond with a pet dog is likely to be a factor in reducing the cardiovascular risk as well as the increased physical activity that comes with dog ownership (Mubanga et al. 2017). Mere pet ownership is not sufficient to test the validity of the claim that pets are good for your health. The strength of the bond between the owner and the pet, as perceived by the owner, needs to play into the equation (Hutton 2015). Someone who owns a pet but has a distant, functional relationship with the animal is unlikely to reap the relational provision benefits (Weiss 1974) that come from a close human–companion animal relationship.

The growing evidence that the human–companion animal relationship provides physical, mental, emotional and social benefits to individuals is strong but even where the strength of the medical evidence is disputed (Herzog 2011), the individual owner’s own perception of the benefits remains significant. Bob initially decided to get a dog because he had suffered a heart attack and a dog was recommended to help him keep active. Whether or not Darcie increased Bob’s chances of recovery at the time or decreases the prospect of another heart attack now, is less important to Bob than the close bond that has developed between them. Bob perceives this bond as akin to family and it provides many of the benefits of living with another human, for example, company rather than loneliness and a sense of purpose and responsibility in meeting Darcie’s welfare needs. Given that society benefits from the human–companion animal relationship, in the form of healthier, less

isolated people with better social networks, it is perplexing that law and social policy do so little to protect the relationship especially in the key area of housing.

Housing Law and Companion Animals

Our relationship with companion animals exists in the home environment. These animals share our home and form a significant part of our daily life routines. We spend more time with our companion animals than we do with human family members who do not live with us. Therefore, laws that govern housing significantly affect our relationship with companion animals. In the UK there is currently nothing to prevent a landlord including a 'no pets' covenant in a tenancy agreement. Restricting pet ownership in this way affects people from all walks of life as living with a companion animal is not limited by class, gender or ethnicity. However, within the housing arena, the inadequacy of law and social policy to protect the human–companion animal relationship, implicates class, disadvantaging those unable to afford to own their home. People on low incomes or those who are reliant on state benefits or are homeless, have fewer choices about where they live and are consequently subject to the whim of the property owner as to whether or not they can keep a companion animal in the property.

Vulnerable People Moving into Care Homes or Supported Accommodation

'No pet' covenants are especially draconian for the elderly and those with mental illness because these are groups of vulnerable people most likely to need to leave their home to move into supported accommodation. If the supported accommodation does not allow them to take their companion animal with them, or there is a change of policy once the person has moved in, as happened with the care home in Scotland where Bob and Darcie lived, the pet owner is left with the difficult choice to either relinquish their companion animal or lose their place in the supported accommodation. Given the nature of the close social bond the elderly develop with their companion animals (Enders-Slegers 2000), it is not surprising that the Blue Cross report that its Pet Bereavement Support Service receives calls from elderly owners who suffer grief after being required to give up their pet to move into a care home that has a 'no pet' policy.³

A Private Member's Bill in 2010 sought to address this problem in England and Wales. The *Care Homes and Sheltered Accommodation (Domestic Pets) Bill 2009–10* received its second reading in the House of Commons in March 2010. This was preceded in 2009 by the *Care Homes (Domestic Pets) Bill 2008–2009*. Although both Bills enjoyed cross party support, and a consensus in the house, based on the acknowledged health benefits of pets for the elderly, especially as an antidote to loneliness, the progress of the 2010 Bill was halted in its tracks by a general election. The Bill sought to create a legal presumption that pets (of an authorised, non-dangerous, species) should be permitted in care homes and sheltered accommodation for the elderly and disabled unless their exclusion could be justified, for example, the safety of the other residents necessitated an exclusion or the welfare needs of the pet could not be met in the care home. It was unfortunate that the Bill ran out of time because the Secretary of State for Health stated that, "The Government understand and very much share the sentiment behind the Bill, and are sympathetic to its aims... We do not

³ The Blue Cross 'Care home pet policies'. <https://www.bluecross.org.uk/carehomes> (accessed 24 November 2017).

want there to be any ban on pets in care homes or sheltered housing. However ... the parliamentary timetable will not allow the Bill to succeed”.⁴

The positive reception of the Private Members’ Bills in the House of Commons shows there is strong support in England for legislation to allow the elderly to take their companion animals into care homes and sheltered accommodation based on the health benefits pets provide. It is a small step to acknowledge these health benefits for all people. It is not just the elderly who suffer cardiovascular disease, loneliness and depression. It is not just the elderly who face the prospect of having to move from their home to alternative accommodation and cope with the guilt and distress of giving up their companion animal, an integral part of their family. France and Canada illustrate that legislation prohibiting ‘no pet’ clauses in all residential leases is possible and not difficult to implement.

All Tenants of Residential Property

Thousands of people each year in the UK face the prospect of giving up their companion animals because they have to move into rental accommodation that prohibit pets.⁵ Pet owners face a restrictive choice of properties, which can lead to them having to rent a less suitable property in respect of location and affordability. Research carried out by the Dogs Trust in 2008 found that 78% of pet owners experienced difficulties finding a residential rental property that allowed pets and by 2011 their research found that pet owners can take up to seven times longer to rent a home compared to non-pet owners.⁶ Research in Australia over a 10 year period to 2013 identified a risk of increased housing insecurity for pet owners, especially where tenants kept pets without the landlord’s knowledge and faced the risk of eviction (Powers 2017).

Ontario, Canada, provides a case study of successful legislation to prohibit ‘no pet’ covenants in all residential leases. A blanket “no pets” clause in a lease is void under Sect. 14 of the Residential Tenancies Act 2006 which states, “A provision in a tenancy agreement prohibiting the presence of animals in or about the residential complex is void”. However, a landlord is permitted to refuse to rent to a person who has a companion animal.⁷ This apparent inconsistency in the law appears to encourage dishonesty on the part of the tenant, or at least a failure to disclose the truth, as it is better for a tenant not to admit to having a companion animal until they have signed the lease. Advertisements for rental properties that specify ‘no pets’ are not considered discriminatory because pet ownership is not protected under Canadian Human Rights laws. However, the position is different for people with disabilities who live with a service animal such as a guide dog for the blind. A landlord cannot refuse to rent to a person with a service dog unless there are exceptional circumstances that justify the refusal, such as the landlord living in the property and having a certified severe pet allergy.

Once there is a tenancy agreement, the landlord cannot evict the tenant on the ground that he or she has a companion animal living in the property with them. The law allows tenants to keep pets on their property even if there is a ‘no pets’ covenant in the lease and even if the tenant signed an agreement at the outset that they would not keep a companion animal in the property. However,

⁴ Hansard, 5 Mar 2010: Column 1177.

⁵ Smith, R. 2011. Pet owners face struggle to find rented accommodation. The Guardian, 27 July 2011 <https://www.theguardian.com/money/2011/jul/27/pet-owners-rented-accommodation> (accessed 12 January 2018).

⁶ The Dogs Trust carried out research in 2008 and 2011 using online surveys to support their ‘Lets with Pets’ campaign, <http://letswithpets.org.uk/media/research> (accessed 13 November 2017).

⁷ Social Justice Tribunals Ontario. Landlord and Tenant Board, frequently asked questions. <http://www.sjto.gov.on.ca/lrb/faqs/#faq8> (accessed 16 November 2017).

the tenant's right to keep companion animals is not unfettered. Land law invariably has to balance the conflicting interests of parties so it is not surprising that there are conditions and exceptions. Under s.76 of the Residential Tenancies Act (2006, Part V) the landlord can apply to the Landlord and Tenant Board to evict a tenant with a pet where:

- (1) The animal has substantially interfered with the reasonable enjoyment of the residential complex for all usual purposes by the landlord and other tenants; or
- (2) The presence of the animal has caused the landlord or another tenant to suffer a serious allergic reaction; or
- (3) The animal is of a species or breed that is inherently dangerous to the safety of the landlord or other tenants.

In respect of grounds (1) and (2), the Board shall only make an order for terminating the tenancy and evicting the tenant if it is satisfied that the animal kept by the tenant caused or contributed to that substantial interference or allergic reaction so the landlord will need to provide evidence of this.

Therefore, a tenant cannot be evicted for keeping a companion animal in their property but could be evicted if that companion animal becomes a nuisance, for example, it causes unreasonable noise disturbances or damage to the property or where the landlord or another tenant has a severe allergic reaction to the animal. What amounts to 'substantial interference' in (1) will depend on the facts of the case but common sense and reasonableness prevail. For example, in respect of noise disturbance, it would be unreasonable to require absolute silence from a pet, so the occasional short period of barking from a dog is expected and neighbours will have to tolerate this as they would a crying baby. However, excessive barking at unsociable hours is likely to constitute a substantial interference with the reasonable enjoyment of the property by the landlord or other tenants and will make a tenant liable to eviction. The Residential Tenancies Act also provides that the commission of an "illegal act" is a ground for any tenant to be evicted. Within this context, an 'illegal act' is a broader concept than a criminal offence. Consequently, failure to abide by animal control by-laws applicable in the local jurisdiction, for example, any licensing or micro-chipping requirements or requirements to pick up dog faeces will constitute an illegal act and thereby constitute a ground for terminating the tenancy.

France was the first country to implement legislation to prohibit 'no pet' covenants in residential leases. It enacted legislation in 1970 stipulating that any prohibition of pets in residential tenancies is deemed to be void (Article 10 of the Law of 9 July 1970). The right of the tenant to be able to keep a companion animal is subject to the requirement that the animal does not cause damage to the property or disturbance to the enjoyment of other occupants (including the landlord). A clause banning dangerous dogs is also permissible. Until recently it was thought that this law only applied to long residential leases, but in February 2011 the French Supreme Court ruled that Article 10 also applies to holiday rental properties so landlords cannot refuse to accept companion animals holidaying with their owners.⁸

Article 8 and the Use of 'No Pet' Covenants in Residential Leases

Article 8 of the European Convention on Human Rights (Art.8) encompasses a right to respect for a person's family and private life and home. Interference with these rights can be justified in certain

⁸ Association Union fédérale des consommateurs de l'Isère—Que Choisir v. Association Clévacances Isère—départementale des locations de vacances de l'Isère et autre. Arrêt n° 109 du 3 février 2011 (0814.402)—Cour de cassation—Première chambre civile.

circumstances including the protection of the health, rights and freedoms of others. The grounds for interference are wide and the state is afforded a margin of appreciation on the basis that the state authorities are best placed to judge the need for the interference and how it is implemented (*Handyside v UK*).⁹ Art.8 covers family life and private life and whilst there is some overlap between these concepts, family life is a narrower concept. It is arguable that the fact that many owners perceive their pet as part of their family may be enough to bring companion animals within the concept of family life for the purposes of Art. 8 (Fox and Westwood 2017)¹⁰ but, if not, the broader concept of private life, which encompasses a variety of issues, could be utilised. The European Court of Human Rights has held that respect for private life includes “the right to establish and develop relationships with human beings”.¹¹ In *Botta v Italy*, the court stated: “Private life, in the Court’s view, includes a person’s physical and psychological integrity: the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings”.¹² Since relations with others fall within private life, it is arguable that a close and meaningful relationship with a companion animal also comes within the scope of this broad concept. Such relationships have been shown to provide physical and mental health benefits as well as building social relationships in a community. On this basis, it is difficult to justify excluding this significant relationship from the protection of Art.8.

There are several ways in which Art.8 could impact on ‘no pet’ covenants in residential leases in the UK:

- (1) By preventing local authority landlords from implementing a blanket ban on all pets in residential rentals;
- (2) By the domestic courts interpreting ‘no pet’ covenants in leases in the private housing sector as unlawful for being in breach of Art.8 by means of indirect horizontal effect by virtue of the fact that the courts are a public body and must not act in contravention of Art.8;
- (3) By encouraging the English and Scottish Parliament to pass legislation to prohibit ‘no pet’ covenants in all residential leases (whether a public or private landlord) on the basis that such covenants constitute an unreasonable interference with human rights.

Local Authority Landlords Cannot Impose a Blanket Ban on Pets

Housing law and policy that allow ‘no pet’ covenants in residential tenancy agreements deny people the very act of living with a companion animal. In Belgium, the courts have held that a clause which prohibits a tenant from keeping a companion animal undermines the tenant’s private life contrary to Article 8 of the ECHR (the Convention was approved by domestic law in Belgium in 1955).

This was first established as a principle in a case in 1986¹³ and later cases demonstrate that courts will seldom enforce a ‘no pet’ clause in a lease, especially if a landlord has initially tolerated the

⁹ (1979–80) 1 EHRR 737.

¹⁰ Companion Animals as Family Members. 2017. Conference paper at ‘Animal Law, Ethics and Legal Education’, Liverpool John Moores University, September 2017.

¹¹ *Niemietz v Germany* (1992) 16 EHRR 97 at para.29.

¹² (1998) 26 EHRR 241 at para.32.

¹³ *Civ.Liege*, October 21, 1986, J.L.M.B., 1987, 578.

presence of a companion animal on the premises but then changes his or her mind.¹⁴ However, an animal can be excluded where it is justifiable, for example, where the animal causes a nuisance to the landlord or other tenants, causes damage to property or is a dangerous animal. Therefore, a clause prohibiting pets that are dangerous or a nuisance or cause damage is permissible as a justifiable and proportionate interference with the tenant's private life. In 2001 a court terminated a lease where a tenant kept two large dogs on the property in breach of a 'no pets' clause in the lease.¹⁵ The court accepted that a general ban on keeping companion animals affects the tenant's right of integrity to private and family life under Article 8, but acknowledged that on the facts of the case the landlord had a legitimate reason for prohibiting certain pets. The court took into account the need of the landlord to avoid disputes with other tenants in the property due to the "special circumstances specific to the building". The small size and layout of the property meant that it was unsuitable for two large dogs. Presumably it would have been permissible for the tenant to have kept a rabbit or a hamster.

The doctrine of proportionality is a key consideration in Art.8 cases and requires that the interference is in proportion to the aim to be achieved and does not go further than is needed. Even if it could be argued that the ban on pets in residential tenancies was necessary in a democratic society to protect the health and rights of the other occupants living in close proximity, a blanket ban on all pets is disproportionate to the object to be achieved. Many companion animals have no adverse effects on neighbours, for example, a house rabbit, a hamster, even a well-behaved dog. The current legislation in Canada and France demonstrates that it is possible to have proportionate interference that permits pets to be banned in certain circumstances, for example, if the pet causes a nuisance or a severe allergic reaction.

In England, public authority landlords must not act in violation of Convention rights when fulfilling their role as a landlord (s.6, Human Rights Act 1998). The Supreme Court has held that Art.8 is engaged in possession proceedings where a local authority landlord is seeking to evict a tenant.¹⁶ If it is accepted that ownership of a companion animal falls within 'family and private life' under Art.8 and that having a blanket ban on all pets in a residential lease is a disproportionate interference with those rights, then the public authority landlord will be acting in contravention of the Convention rights if it enforces the 'no pet' covenant in the lease.

The Duty of the English Courts as a Public Body to Respect Private Life

The scope of Art.8 does not stop with public authority landlords. The case law of the European Court of Human Rights shows that Art.8 imposes positive obligations on states to adopt measures that secure respect for private life even in the sphere of private relations such as between a tenant and a private landlord (Rook 2001). This refers to 'indirect horizontal effect' where legal relations between private parties are indirectly affected by relying on another cause of action—in this case, repossession of let property—as a vehicle by which the Convention rights can have an impact (Clayton and Tomlinson 2009). Under s.6, Human Rights Act 1998 the English court, as a public authority, is required not to act in a way which is incompatible with a Convention right.¹⁷ There is consequently an argument that if a private landlord seeks a repossession order in an English court,

¹⁴ Y. Merchiers, *Les baux, Le bail en general*, Larcier, 1997, p. 210, who quotes *Civ. Termonde*, February 20th 1989, R.W., 1990–1991, p. 216 and *J.P. Lennik*, January 25th 1988, R.W., 1989–1990, p. 161.

¹⁵ *Justice of the Peace of Couvin*, 14 June 2001.

¹⁶ *Manchester CC v Pinnock* [2010] UKSC 45, [2011] 2 AC 104.

¹⁷ *Campbell* [2004] 2 WLR 1232.

on the basis of a tenant keeping a companion animal in breach of a covenant in the lease prohibiting pets, the court would be able to declare the 'no pets' clause as contrary to Art.8 and consequently unlawful. Thus, a private landlord would not be able to evict a tenant solely on the basis of their keeping companion animals on the property. Whilst the English courts have been reluctant to apply Art.8 to possession proceedings between private individuals in the private housing sector,¹⁸ Ramshaw argues that there are strong reasons for changing this approach.¹⁹ In respect of 'no pet' covenants, Belgium provides a useful example of how Art.8 can be used by the domestic courts to prevent a tenant from being evicted for keeping a companion animal but the problem is that this approach doesn't prevent 'no pet' clauses from being included in a lease agreement in the first place. This means that many tenants, unfamiliar with the intricacies of the law, will assume the covenant to be valid and believe they cannot keep a companion animal at the property. If a tenant does introduce a companion animal and the landlord brings an action in court to evict the tenant, it will be up to the court, on a case by case basis to determine whether the tenant can be evicted.

Legislation by Parliament

There is considerable regulation by the state in the sphere of rentals by private landlords. Laws have often recognised the unequal bargaining strengths between landowners and those seeking to find somewhere to live and have consequently sought to limit the power of landlords to impose unreasonable conditions or restrictions (for example the Rent Act 1977 prohibited unreasonable rents). The need to regulate the power of private landlords is especially significant in the current economic climate of austerity, in which home ownership is declining and rental accommodation is in high demand. Housing is a fundamental human need and society has a responsibility to adopt laws that protect tenants from arbitrarily losing their home. Bob faced eviction because a new manager of the residential care home did not want him to keep his dog, Darcie. No law protects Bob's relationship with Darcie even though for Bob, Darcie is akin to a family member. The decision to own a companion animal and enjoy the health benefits and expansion of social networks that accompanies this decision arguably falls within a person's family and private life under Art.8. Therefore, it is appropriate for the state to pass a law prohibiting 'no pet' covenants in residential leases since a blanket ban on pets constitutes an unreasonable interference with a person's private life.

Conclusion

In Canada the Law Commission has recognised the need for the state to identify and support a variety of close relationships, especially in the LGBT community (Westwood 2013). Their report recommended, "the state must provide adequate legal structures that support the relationships that citizens develop" (Law Commission of Canada 2001). The Law Commission was not talking about companion animals but nevertheless it is a recognition by an important institution of law reform that the law needs to keep pace with changes in society in how we construct social relationships with 'significant others'. Whether the significant other is a human or a companion animal does not detract from the strength of the bond and its significance to that person. The law's failure to recognise and protect this relationship can put people at risk, for example, owners of companion

¹⁸ McDonald v McDonald [2016] UKSC 28, [2016] 3 WLR 45; Malik v Fassenfelt [2013] EWCA Civ 798, [2013] 28 EG 84.

¹⁹ Ramshaw, A. The role of Article 8 of the European Convention on Human Rights in public and private sector possession proceedings. PhD thesis, 2016.

animals having to leave supported accommodation or taking a lease beyond their financial means or in an unsuitable location just to be able to maintain their relationship with their companion animal.

We already have a precedent for treating animals differently under the law depending on the way we use them and the social category we give them. This legal construct can be invoked to protect our relationship with companion animals. By understanding the origin of the legal status of domestic animals as property, it is possible to differentiate companion animals from other animals. The key to this is to differentiate animals on the basis of *our relationship* with the animals. It is the nature of the relationship that is significant and not the fact of ownership. Domestic animals are owned by someone whether it is a pig being raised for meat or a dog living in the home and treated as a family member. The concept of ownership is the same in these two examples, but the essential difference is the nature of the human–animal relationship. One is based on domination and the other is based on trust. One is a relationship of ownership in which the pig is used for the benefit of humans regardless of the detrimental effects on its welfare, whereas the other is a social relationship which benefits both the dog and the human and creates a close bond of mutual companionship. The law should recognise this difference and better protect the human–companion animal relationship. Nowhere is this more important than in the housing arena, since restrictions in allowing tenants to keep pets in residential properties denies them the opportunity to extend their social networks by acquiring and maintaining valuable social relationships. The fact that this social relationship is with an animal and not a human is irrelevant as both provide benefits to social wellbeing and health. It is here advocated that the human–companion animal relationship falls within the perimeters of ‘private life’ in Art.8 ECHR and therefore should be respected under English and Scottish law. The best way to ensure this protection is by legislation to prohibit ‘no pet’ covenants in residential leases in all properties, whether in the public or private housing sector, subject to reasonable exceptions such as the health and wellbeing of other occupants.

Compliance with ethical standards

Conflict of interest The author states that there is no conflict of interest.

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2.2 Who Gets Charlie? The Emergence of Pet Custody Disputes in Family Law: Adapting Theoretical Tools from Child Law

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ABSTRACT

There is evidence to suggest that many owners see their pet as a family member. It is unsurprising then that family lawyers are being asked to advise on pet custody matters. Since pets are personal property, such disputes fall within divorce financial proceedings. An examination of reported cases in the USA and Israel show that two distinct tests have emerged to resolve pet custody disputes: first, the application of pure property law principles and secondly, the application of a 'best interests of the animal' test. The cases show that while the courts are quick to emphasise the property status of pets, apply the property law test, and dismiss the 'best interests of the animal' test, nevertheless other factors are not without influence in the courts' decisions. The unique nature of pets as living and sentient property gives rise to two factors in particular: the emotional bonds that exist between the pet and carers and the interest the pet has in avoiding physical harm. It is advocated that these factors should be relevant considerations and may prevail over property law considerations. The extensive literature on children's rights and the 'best interest of the child' test is harnessed to support and justify a new approach to resolving pet custody disputes – one which recognises the unique nature of this living and sentient property.

I was married with two dogs. We had lived together prior to getting married and had shared ownership in the two dogs...We decided to split up and came to a settlement agreement. It was decided that I would get to keep the dogs in exchange for me signing over my Mercedes Benz SLK 2006 model (worth around 15,000GBP at the time)...other than these two items, we mostly split things 50:50. So in my valuation, keeping the dogs without any bickering or nastiness cost me around 15,000GBP and he never once asked about them afterwards. He has since got another dog

(same breed). I don't regret the decision for a second. A car is just a thing, it can be replaced. I couldn't live without the two dogs! (SLSA conference delegate).¹

I. INTRODUCTION

A survey in 2011 in the UK revealed that 20 per cent of separating couples with pets have sought legal advice and fought for custody of their pet when their relationship broke down.² This survey supports earlier surveys undertaken in 2007³ and 2005⁴ both of which demonstrated a growing number of legal battles in the UK concerning the custody of pets. In law pets are personal property and consequently pet custody disputes arising from a divorce fall within the financial provision proceedings in the family courts. While some may feel that fighting for custody of the family pet is an

inappropriate use of the family courts and a drain on its time and resources the evidence shows that pet owners do not feel that way. The 2005 survey found that 87 per cent of the dog owners surveyed viewed their dog as a family member and 15 per cent of them would pay over £10,000 to secure custody of their dog on separation from their partner. These statistics show that pet custody disputes are already a part of our society and with an increasing number of households in the UK owning pets⁵ combined with a high percentage of marriages ending in divorce⁶ such disputes are likely to become more prevalent.

The aim of this article is to examine the tests currently used to resolve pet custody disputes and to establish the best approach. Because of the distinct lack of judicial precedent and academic discussion on pet custody in England and Wales, the article analyses countries where the courts or legislature have already tackled these disputes namely the USA and Israel, where there are a number of reported cases, and Switzerland which has amended its Civil Code to specifically govern the issue. While these three legal systems are distinguishable (varying in their common law and civil law approach), the issues raised in relation to pet custody are similar and permits comparison. From this analysis it will be shown that two distinct tests for resolving pet custody disputes in family courts emerge – first, the application of pure property law principles arising from the status of pets as property and secondly, the application of a ‘best interests of the animal’ test. Under a property law test, the pet is given to the person who has the better claim to title of the property so the parties need to provide evidence of that claim to title. This may be relatively straightforward if there is a receipt of purchase or adoption certificate from an animal shelter. However, in the absence of this the parties can adduce evidence addressing matters such as: Who pays the veterinary bills? Who purchases the pet food? Who pays the insurance premiums for the pet insurance? The second test, the ‘best interests of the animal’ test, has been compared to the ‘best interests of the child’ test a standard used in many countries to determine the residency of children in disputes between parents. The analysis of the cases in this article will show that the property law approach is the favoured approach however the ‘best interest of the animal’ test has been considered in some cases and has at times influenced the decision of the court.

There has been some academic discussion of the ‘best interest of the animal’ test and its links to the ‘best interests of the child’ test. [Lerner \(2010\)](#) believes that there are useful comparisons to be made in Israel between the ‘good of the child’ and the ‘good of the animal’ tests but recognises the importance of respecting the distinctions. Animals are not children and there cannot be a blanket application of the same considerations. [Huss \(2003\)](#) uses child custody law in America as a framework to advocate new statutory provisions to govern pet custody disputes, while [Gregory \(2010\)](#) argues that comparisons with child custody laws are inappropriate and unnecessary as the property law test favoured by the American courts remains the best approach to resolve disputes. There are no published articles examining pet custody in the light of child law in England and Wales and yet there are interesting analogies to be drawn especially in relation to the historical development of the law governing the residency of children.

There have been significant changes in this law over the last 150 years and along this time line of changes there have been a number of shifts in approach. The law has moved from protecting a father’s pecuniary interest in his child, to protecting the interests of the child itself and in response to this shift there has been a move away from court reliance on strict rules to greater judicial discretion in the use of the ‘best interests of the child’ test ([Eekelaar, 1986](#); [Mnookin, 1975](#)). Over the years, there has been extensive academic critical analysis of the ‘best interests of the child’ test and the rights of children. A number of these seminal articles now provide valuable theoretical models for analysing the best approach to adopt in pet custody disputes especially some of the older

articles where the shifts in approach were first analysed. It is arguable that we are currently on the verge of a shift in approach in resolving pet custody disputes – a move away from the application of pure property law towards an approach that recognises the interests of animals.

The examination of the case law will demonstrate that a pure property law test is not always appropriate to resolve a pet custody dispute and understanding why this is the case leads to some interesting conclusions. The legal status of domestic animals is that of property but they constitute a unique type of property; animals are living and sentient property and this is the crucial factor. This article adopts the terminology ‘pet custody disputes’ as opposed to ‘pet ownership disputes’ because it better acknowledges the nature of animals as living and sentient property. There are important consequences that flow from this recognition. First, as a sentient being this type of property has ‘interests’, eg, the interest in not being physically abused and treated cruelly (Singer, 1995). Secondly, strong emotional bonds can develop between the property and its owner. In fact, pet custody disputes only arise because of this emotional bond. Either both parties genuinely love their pet and both want to keep it or one party feels this way and the other party is merely using the pet as a bargaining chip in order to get a better financial deal.

Either way it is the emotional bond between the pet and at least one of its human carers that triggers the dispute. It is the irreplaceability of this special relationship that means that the dispute cannot be resolved by simply buying another pet of the same breed and type. ‘A car is just a thing, it can be replaced. I couldn’t live without the two dogs!’ illustrates the strength of feeling that can exist. It is arguable that this bond will be stronger in respect of pets that live in the home such as cats and dogs than in relation to animals that live outside such as horses and donkeys but no blanket rule can be applied as owners form strong bonds with all kinds of pets. However, emotional bonds are unlikely to be relevant in situations where animals are kept for purely commercial purposes rather than as a pet. A large horse riding stables owned as a commercial enterprise by a divorcing couple could be an example of this. It is here advocated that these factors – the existence of ‘interests’ and special relationships – requires the adoption of a test unique to pet custody disputes, a test which is based on property law but also borrows theoretical tools used in child law.

II. THE PERCEPTION OF PETS – PROPERTY OR FAMILY?

Domestic pets are treated as personal property in the eyes of the law.⁷ This is in sharp contrast with the perception of many pet owners who see their pet as a member of their family.⁸ In 2008, an empirical study in Swansea to explore family formation and kinship networks found that ‘the species barrier is no obstacle to pets being defined as kin’ (Charles and Davies, 2011). This was an unexpected finding because the researchers did not explicitly ask about animals but nevertheless almost a quarter of those interviewed spontaneously included their pets as part of their kinship network. The accidental fashion in which these data were ascertained – on the initiative of the interviewee without any prompting from the interviewer – strengthens the robustness of these findings. It confirms earlier research which advocated ‘that the vast majority of western pet owners regard their pets as members of the family’ (Serpell, 1996). However, due to their property status, pets fall within the law governing financial provision and property allocation on divorce. They are collated with other matrimonial property such as the family car, television, and Wii. Clearly, there is an inconsistency here and this is apparent when decisions of the courts are examined.

1. Two Divergent Approaches – ‘property law’ Versus ‘best interests of the animal’ Test

In the USA, there have been a number of reported pet custody cases and a wealth of academic debate around these decisions (Britton, 2006; Gregory, 2010; Huss, 2003; Morgan, 1999; Stroh, 2007). Since the law governing divorce is a state matter dependent upon the applicable jurisdiction, it is not surprising that there are conflicting decisions. However, the majority of the decisions share the same underlying inconsistency between the courts' insistence that animals are personal property and their reluctance to rely on property law principles alone to resolve the dispute. A brief consideration of some of the main cases will demonstrate this and reveal the growing willingness of some courts to recognise the unique nature of this property as living and sentient.

In *Arrington v Arrington*⁹ in 1981, a Texas trial court emphasised that pets are property and refused to apply a 'best interest of the pet' test. Interestingly, the judge in this case suggested that pets benefit from their property status as they escape the harm suffered by some children who are 'used by their parents to vent spite on each other'.¹⁰ However, despite the court's emphasis on the property status of the animal, it nevertheless awarded custody to the wife and visitation rights to the husband. This is at odds with the judge's insistence that pets are property since visitation rights are not awarded in relation to personal property. The judge clearly struggled with using a pure property law test to resolve the dispute and consequently awarded visitation rights to the husband in recognition of the strong emotional bond existing between him and the pet. The 1984 case of *Re Marriage of Stewart*¹¹ is another example of the court rejecting a 'best interest of the animal' test and emphasising the property status of animals but then reaching a decision at odds with the application of property law principles. The Iowa trial court stated that, 'a dog is personal property and while courts should not put a family pet in a position of being abused or uncared for, [they] do not have to determine the best interests of a pet'.¹² The court gave custody of the dog to the husband, with whom he had remained after the couple separated, despite the fact that the husband had given him to his wife as a gift. If the case had been decided on property law alone the wife would have been awarded custody since she was given the dog as a gift and therefore had the better claim to title. Once again there is a recognition here that this property is like no other. Since it is sentient and capable of suffering, there are special factors for the court to consider and in this case it led to custody being awarded to the person with the weaker claim to title.

The case of *Bennett v Bennett*¹³ in 1995 adopts a strict property law approach but it is the reason for this that is of particular interest. The Florida District Appeal Court said that there was no authority allowing trial courts to award custody or visitation in relation to personal property. At first instance, custody of the dog was given to the husband and the wife was awarded visitation rights. On appeal the award of visitation rights was reversed. The appeal court did recognise that 'a dog may be considered by many to be a member of the family' but nevertheless emphasised its property status and held that there was 'no authority which provides for a trial court to grant custody or visitation pertaining to personal property'.¹⁴ What is significant is that the court is adopting a pragmatic approach based on the logistics of policing visitation rights. It is not that the court rejects the unique status of animals as living and sentient property but just that the extension of visitation rights to pets would not be feasible because the court system would be unable to cope with the influx of cases for enforcement. The appeal court observed that 'Our courts are overwhelmed with the supervision of custody, visitation, and support matters related to the protection of our children. We cannot undertake the same responsibility to animals'.¹⁵

There are a number of cases which illustrate the court's sympathy towards a 'best interests of the animal' test. The case of *Raymond v Lachman*¹⁶ in 1999 concerned two flatmates rather than a divorced couple. The New York appellate court reversed the decision of the trial court which had awarded custody of a pet cat to its legal owner – the person with the better claim to property title. Instead the appeal court took into consideration the age and life expectancy of the 10-year old cat

and allowed it to 'remain where he has lived, prospered, loved and been loved for the past four years'. In some respects, this is a remarkable decision as it is a clear rejection of a pure property law approach. While there is no open admission that the court is applying the 'best interests of the animal' test it is difficult to see how this could be interpreted as anything else. A similar approach was taken by a Virginia trial court in *Zovko v Gregory*¹⁷ where the best interests of the cat meant that it was awarded to the roommate who did not own the cat. Significantly these cases concerned flatmates rather than divorcees. Such cases are usually decided purely on property law principles because, unlike in cases of divorce, there is no wider discretion available to the courts. *Juelfs v Gough*¹⁸ in 2002 is an example of a similar approach being taken in a family court. The Alaska Supreme Court upheld the award of sole custody of the family dog to the husband. The dog was at risk of serious physical injury at the wife's residence because she had other dogs living with her which were deemed a threat to the dog. Therefore, the interest of the dog in avoiding physical injury prevailed over the application of property law principles. The Appellant Division New Jersey Superior Court confirmed this approach in the 2009 case of *Houseman v Dare*.¹⁹ It rejected the 'best interest of the animal' approach as a general rule but included a significant caveat; the test could apply in cases of animal abuse. Consequently, if the pet may be at risk of physical abuse and injury by the person with the greater claim to title, their property right can be overridden.

Houseman v Dare is an excellent example of the court acknowledging the unique nature of pets as a distinct type of personal property. The Appellate Court held that specific performance was available to remedy a breach of an oral agreement between a separating unmarried couple over the custody of their dog. The oral agreement between the couple gave them joint possession of their dog on the basis of an alternating 5-week period. When one of them breached the agreement by refusing to share the dog, the other sought a court order for specific performance. Orders for specific performance in respect of personal property can only be made if the property is unique or rare and in the trial court the judge decided that pets 'lack the unique value essential to an award of specific performance' and instead awarded damages.²⁰ But the Appellate Court overruled this decision and granted specific performance recognising the unique, subjective value attached to pets that distinguish them from most other types of personal property. In reaching this decision, it found similarities between the way people value their pets and other sentimental pieces of personal property such as a family heirloom. It has been suggested that this approach creates a model for courts to decide future pet custody disputes in a more uniform manner by adopting an analytical framework analogous to disputes over heirlooms and family treasures for which there are clear precedents (Kotloff, 2010). Such an approach requires the court to take into account the sentimental value people place on certain types of property.

What all these cases show is that even though the courts are quick to affirm the property status of pets and are unwilling to adopt a 'best interests of the animal' test they struggle to resolve the dispute by property law principles alone. Instead the courts are often willing to acknowledge the special nature of this living and sentient property and to thereby take into account other considerations unique to this type of property dispute; specifically the close bond that can exist between a person and their pet and the interest an animal has in avoiding physical injury.

Israel appears to have gone further than the USA towards adopting a 'best interest of the animal' test in pet custody disputes. The 2004 Israeli case of *Ploni v Plonit*²¹ concerned an unmarried couple who, during their relationship, rescued a street cat and an ailing dog. When they split up the woman left the couple's home taking the cat and dog with her. Subsequently, the man petitioned the court for joint custody of the pets or for the two animals to be separated and each person to get one of the animals. The court adopted a 'good of the animal' test and heard evidence from an expert on

animal behaviour to reach its conclusion that both of the animals remain with the woman. At a practical level, the use of expert evidence on animal psychology/behaviour and the consequent increased time and resources this entails is likely to weigh against the use of such a test. Judge Shochet openly acknowledged the inadequacy of the law to resolve pet custody disputes, observing that 'The concept of companion animals as property does not provide the legal system with tools to adjudicate and resolve the petitions and bring them to a suitable solution'.²² Judge Shochet quoted the American case of *Corso v Crawford Dog and Cat Hospital* in which a New York court stated that 'animals are not property, rather a unique construction existing somewhere between inanimate objects and humans'.²³ However, subsequent American cases did not follow this interpretation of the status of animals and instead continued to treat pets purely as property. Although Judge Shochet quoted the *Corso* case, he nevertheless retained the category of personal property for animals with the caveat that animals should be distinguished from inanimate objects.

Lerner (2010: 116) compares the 'good of the animal' test to the 'good of the child test' in Israeli law and observes that 'the "good of the animal" test provides a suitable framework to add characteristics that are appropriate for animals, but not the same characteristics that are appropriate for children'. In Israel factors relevant to the residency of a child include the educational environment, the religion, and lifestyle of the parents all of which are clearly irrelevant to a pet. Thus, Lerner argues that it is important to recognise the differences between the two tests and not try to equate pets with children. He appreciates the limitations of the 'good of the animal' test and identifies instances in which it will not be applied, eg, a child's positive relationship with the pet may mean that the animal is given to the parent who has custody of the child even though the animal has a closer bond with the other parent. Thus, he argues the interests of the child outweigh those of the animal. Taking into account the interests of a child certainly adds to the complexity of the dispute and it is likely that parents and courts will take this consideration into account in appropriate cases where being with the pet is shown to have a positive effect on the wellbeing of the child. This gives further support to the need to recognise the special relationship humans can have with their pet and the need for this to be taken into account in the decision-making process.

Unsurprisingly, given its record on animal protection laws, Switzerland amended its Civil Code to provide a test for deciding pet custody disputes that takes into account the interests of the animal (Michel and Kayasseh, 2011). In 2003, Article 651 of the Swiss Civil Code, which deals with the shared ownership of property, was amended and the new Article 651a provides a test which directs the court to give sole ownership of the jointly owned pet to the party 'that, with regard to animal protection, ensures the better keeping of the animal'. The focus here is on what is in the best interests of the pet and Michel and Kayasseh (2011: 30) argue that 'According to the legislative materials, an animal's welfare encompasses not only its physical needs (e.g. basic daily needs including medical care) but also its psychological wellbeing'. It is particularly notable that exclusive ownership of a co-owned pet is awarded to one of the parties. Joint ownership is never an option. But the court can require the person who acquires sole title of the pet to pay adequate compensation to the other party. The amount payable is in the discretion of the judge but there is uncertainty over whether a judge can take into account the sentimental value a person attaches to their pet when calculating the compensation payable. Unfortunately, Article 651a is silent on the matter.

From this analysis of the approaches taken in the USA, Israel, and Switzerland two divergent approaches emerge. On the whole, the cases from the USA favour the 'property law' approach which determines custody on the basis of who has the better claim to title of the property, *Bennett v Bennett* being a good example of this. Nevertheless, some of the courts have recognised the special

nature of this type of property, eg in *Arrington v Arrington* where the court awarded visitation rights to the husband in recognition of the strong emotional bond between him and the pet. No other type of matrimonial property would lead to an award of visitation rights. Clearly the award of visitation rights sits uncomfortably with property ownership but the fact that the courts have been willing to award visitation demonstrates the unique qualities of animals as property. Occasionally, the courts in the USA have gone so far as to allow the interests of the animal to prevail over property law considerations as in the cases of *Raymond v Lachman* and *Zovko v Gregory*. These cases illustrate the second approach to deciding pet custody cases known as ‘the best interests of the animal’ test. In *Raymond v Lachman*, the fact that the cat was an elderly cat was a significant consideration and led to the court’s decision to allow the cat to stay with the person it was currently living with though this person was not the owner of the cat. It was felt that to uproot the cat in its old age would be confusing and disorientating for it. The court was deciding the best environment for the cat on the basis of the cat’s own welfare needs. A similar type of test has been used in Israel with the ‘good of the animal’ test and in Switzerland with the ‘better keeping of the animal’ test.

The cases demonstrate the courts’ reluctance on the one hand to decide cases on pure property law principles alone and on the other hand to acknowledge a ‘best interest of the animal’ test. A new approach is needed; one that fits within the existing property paradigm but nevertheless recognises the special nature of this living and sentient property and consequently permits consideration of factors that do not normally apply to other types of property such as the existence of strong emotional bonds and the interest of the animal in avoiding physical injury. To this end, theoretical concepts used in Child law to analyse the ‘best interests of the child’ test and the nature of children’s rights provide valuable support and justification for this new approach.

III. DRAWING ON THEORETICAL TOOLS USED TO ANALYSE THE ‘BEST INTERESTS OF THE CHILD’ TEST

Analogies have been made with the law governing a child’s residency ([Huss, 2003](#); [Lerner, 2010](#)) and there are useful comparisons to be made in this respect. Children’s rights and ‘the best interest of the child’ test have been extensively analysed ([Eekelaar, 1986](#); [Eekelaar, 1994](#); [Fortin, 2009](#); [Herring, 2005](#); [Mnookin, 1975](#)) and consequently the benefit of these theoretical models can be drawn upon to provide a better understanding of how to determine pet custody disputes. What is especially interesting is the change in the law’s characterisation of children and the parent–child relationship over the years. Freeman observes that ‘Throughout most of our history children were treated as the property of their fathers’ ([Freeman, 2008](#)). Children were not the property of their parents and could not be sold or destroyed but were nevertheless treated similar to property. Children, especially heirs, were primarily agents for the devolution of property and the law protected a father’s pecuniary interest in a child. Eekelaar (1986: 167) notes that ‘one might summarize the position in Blackstone’s day as being that the legal apparatus protected a father’s relationship with his legitimate children not primarily because the children’s interests were thought worth protecting in themselves but because it was in one way or another deemed beneficial to the father’. Child law has progressed significantly since then; now in England a family court must give the welfare of the child paramount consideration in reaching a decision over the residency of that child. Section 1 of the Children Act 1989 provides a ‘welfare checklist’ specifying a non-exhaustive list of factors for the court to consider.

This article does not advocate that pets are the same as children, nor that the law should treat them as such, but the extensive academic research carried out in relation to the ‘best interest of the child’

test provides a useful eyepiece through which to view pet custody. Mnookin's seminal article from the 1970s provides a critique of the 'best interests of the child' principle (the 'principle') and many critiques draw inspiration from his writings (Elster, 1987; Parker, 1994). He argued that the principle constituted an indeterminate test due to the speculative nature of trying to accurately predict human behaviour and also from a lack of social consensus about the set of values that should be used to decide what is in the child's best interests. Should the decision be based on the child's happiness, education, religion? He also argued that the principle encourages litigation because the outcome is difficult to predict compared to the application of a more definite and determinate set of rules. Over the years, the 'best interests of the child' principle has been both attacked and defended (Eekelaar, 2002; Herring, 2005) but that debate is outside the scope of this article. However, Mnookin's article is valuable because in his attempt to overcome the inadequacies of the principle he devised two rules and these rules resonate with some of the pet custody decisions and could be used to formulate the best approach to decide pet custody cases. Eekelaar (1986: 45) explains: 'In the sphere of private law, Mnookin suggested two "intermediate" rules which could partially replace the "principle."' One was that no action should be taken which would pose an immediate and substantial threat to the child's physical health and the other that, in disputes between parents, the court should prefer the adult 'who has a psychological relationship with the child from the child's perspective'.

The theoretical basis underpinning Mnookin's alternative test lends support to the proposition that a similar test should be used in pet custody cases. The analysis of the cases from the USA and Israel demonstrates how the courts struggle to decide cases on property law principles alone and instead seem willing to take into account other considerations specifically the interest an animal has in avoiding physical injury and the close bond that can exist between a person and their pet. There are clear parallels here to the underlying justifications for Mnookin's two intermediate rules which are two-fold: first, the fact that society seeks to prevent physical harm to children; and secondly, the recognition that children are capable of strong emotional relationships with others. These two factors apply to pets: first, society seeks to prevent unnecessary physical injury to domestic animals and has passed legislation to this effect, eg, in England it is a criminal offence under the Animal Welfare Act 2006 for a person to cause unnecessary suffering to their pet. Secondly, people develop strong emotional bonds with their pets as evidenced by the research on family kinship in which pets were spontaneously included in kinship networks (Charles and Davies, 2011).

Therefore, the same underlying justifications exist and support the use of a test in pet custody disputes that takes into account two rules similar to those devised by Mnookin. First, custody of the pet will not be given to anyone who poses an immediate and substantial threat to the animal's physical health. This rule stems from society's recognition that domestic animals are sentient beings and pets have an interest in not enduring unnecessary suffering at the hands of their owners. This interest has been deemed so important as to be worthy of the protection of the law. This is discussed in more depth later. Secondly, the emotional bond between the human and animal (from the perspective of the human) should be a relevant factor and taken into account in determining the residency of the pet. Mnookin (1975: 286) referred to the affection-relationship between the adult and the child which could be inferred from evidence of 'the continuity of the relationship between the child and adult in terms of proximity and duration; the love of the adult toward the child; and the affection and trust of the child toward the adult'. He felt that adopting a psychological best interest test could work where one of the parties was a psychological parent and the other was a stranger but he acknowledged that the test could not help to choose between the parties where both had a psychological relationship with the child. It is here suggested that the emotional bond that a person has with their pet should be a relevant factor in determining pet custody but in the majority of

disputes both humans are likely to have a strong emotional bond with the pet otherwise the dispute would not arise in the first place. However, in the rare case where one party has a strong emotional bond with the pet and the other party is effectively a 'stranger' to the pet, spending very little time with it, then a variant of Mnookin's rule on psychological relationships could be adopted so that the emotional bond is taken into account and may prevail over a stronger claim to title.

IV. ANALYSING THE 'BEST INTERESTS OF THE PET' TEST

One of Mnookin's criticisms of the 'best interests of the child' principle was the lack of social consensus about the set of values that should be used to decide what is in the child's best interests. What should be the basis of the decision – the child's happiness, their education, or religion? In relation to pets these matters are less contentious. If we look at Eekelaar's concepts of 'objectivization' and 'dynamic selfdeterminism' devised to explain what the 'best interests of the child' means in a way that reconciles the paternalism model with the idea of children as rights-holders, we find a useful model to apply to pets (Eekelaar, 1994). He suggests that perceptions of a child's best interests may be formed in accordance with two distinct methods: Objectivisation and Dynamic self-determinism. For pets, it is the objectivisation that is the relevant part of the equation since domestic animals never acquire the competence to make their own life choices. Eekelaar (1994: 58) explains that 'In contrast to dynamic self-determination, objectivisation is often a process of crude generalization of how children's well-being will normally be realised within the society in which they will live, founded on a global view of socialization or the demands of organisational necessity'. This part of the decision making process is similar to the process used in pet custody disputes and Eekelaar's model demonstrates this. Most people have little scientific knowledge of the psychology and behaviour of domestic animals but nevertheless claim to know what is in the best interests of their own pet. Thus, they make crude generalisations about what is in their pet's best interests such as, 'it is better for Misty (the cat) to stay in the family home where she has lived all her life than to move her to a new home'. It was on this basis that the elderly cat in *Raymond v Lachman*²⁴ was given to the person with whom he was living rather than to the person with the better claim to property title. Thus, it could be said that the court was making a decision on the basis of the interests of the cat using an objectivisation method.

In England and Wales, the Animal Welfare Act 2006 introduced a new 'welfare offence', which imposes a positive duty on persons responsible for a pet to take reasonable steps to meet the welfare needs of their pets such as the need for a suitable diet and environment, the need to exhibit normal behaviour patterns, and the need to be protected from pain and suffering. There are even Codes of Practice, such as the Code of Practice for the Welfare of Dogs,²⁵ which give advice on how to look after a pet. For example, the code recommends a pet dog be given daily exercise and regular opportunities for play with people or other dogs. Therefore, it is likely that most couples who genuinely care for the welfare of their pet will make a decision on custody based on these objectivisations. As with child custody, there will be a minority of hostile cases where the owners essentially put their own interests first. Research in 2005 on child residence and contact disputes in court found that some parents were unwilling to separate events that had occurred during the marriage from the question of the child's residence so that fault, blame and revenge became relevant factors for these parents (Smart et al., 2005). Some pet custody disputes may be driven by a similar desire to punish the other party or to extract a better financial deal from them. In such cases, it is likely that the welfare of the animal will be subordinated to other interests.

1. Drawing on Theoretical Tools used to Analyse Children's Rights

There are important theoretical distinctions between a rights-based approach and a welfare approach, essentially based on who the primary decision-maker is: the child (a proxy, if the child is not yet competent) or another (Herring, 2005). However, it is clear that the two approaches do not have to be mutually exclusive; a rights-based approach is not necessarily devoid of any element of welfare (Fortin, 2004). The theory behind children's rights has been extensively analysed to reconcile paternalism, arising from the inability of younger children to make rational and informed decisions, with the concept of a rights-holder (Eekelaar, 1994). The 'choice' or 'claim' theory of rights as espoused by Hart means that babies and animals cannot be rightsholders as they lack the competence to make choices and lay claim to their rights (MacCormick, 1982). However, the 'interest' theory of rights is of more relevance in the context of animals and pet custody. According to Raz (1984: 5): 'One justifies a statement that a person has a right by pointing to an interest of his and to reasons why it is to be taken seriously.' Thus legal rights are legally protected interests; interests deemed so important as to constitute a sufficient ground for holding another to be subject to a duty. Children have interests that need protecting and this model avoids denying them rights until they are old enough to claim them. The challenge for this theory of rights is determining which interests can be translated into rights. Leaving aside the question of whether a domestic animal can have legal rights, it is nevertheless useful to examine the way in which children's rights (sometimes called 'interests' because of the uncertainty over translation into rights) have been classified and it is here suggested that this can help shed light on the best approach to determine pet custody disputes. Pets as sentient beings have interests that need protecting; interests deemed so important by society that legislation has been passed to protect those interests, in particular, the interest a pet has in avoiding pain and suffering.

A number of classifications of children's rights have been formulated. Bevan's model of children's rights divides them into two broad categories: protective and self-assertive (Bevan, 1989). Assertive rights include a claim to adult rights such as freedom of expression and conscience and have no relevance here. However, 'protective rights' arise from a child's vulnerability and dependence on others and this aspect draws parallels with pets which are also vulnerable and dependent on others. Fortin's succinct summary of Bevan's category highlights the underlying justification for these rights and in doing so demonstrates the similarities to the position of domestic animals: 'Children's "protective rights" arise from their innate dependence and vulnerability and an obvious need for nurture, love and care, both physical and psychological. These rights must include the right to protection from ill-treatment and the right to state intervention in order to achieve such protection' (Fortin, 2009: 17).

Eekelaar (1986) identifies three categories of children's interests; basic interests, developmental interests, and autonomy interests. Basic interests arise from the physical, emotional and intellectual care, and well-being of a child. This is seen as the minimal expectation from the child's carers, usually the parents, to meet the basic physical and emotional needs. Developmental interests relate to the claims of the wider community to maximise a child's potential and autonomy interests concern the freedom of a child to choose his or her own lifestyle. In nineteenth century England the interests of the father prevailed over those of the child. Eekelaar states that in relation to basic interests however there was a reversal of this earlier characterisation of the parent-child relationship which subordinated the child to the parent. The criminal law protected children from severe physical injury even if perpetrated by the child's parents. In *R v De Manneville*²⁶ in 1804 a father claimed possession of his child but the court refused because of its concern of putting the child in danger of physical injury. To refuse the father his rights over his child was very unusual at that time; that the court was prepared to do so shows the strength of feeling towards preventing physical injury to children. Recognising this reversal of approach in relation to basic interests, Eekelaar (1986: 172)

observes that ‘This reflects not only the social recognition of the basic interests of the rightsholders as ends in themselves, but also a societal decision of the priority to be applied where those interests conflict with the interests of others, in this case, the parents. Even if respect for these rights may be conceived by the parent to be contrary to the parent’s own interests, those interests must give way to those of the child’.

2. Protecting the Pet’s ‘Interest’ in Avoiding Physical Harm Something similar to this reversal is visible in those pet custody cases where the court subordinated the rights of the property owner to the animal’s interest in avoiding severe physical injury. In *Juelfs v Gough*²⁷ the Alaska Supreme Court upheld the award of sole custody of the family dog to the husband on the basis that the wife’s other dogs were a threat to the dog’s life and the Appellant Division of the New Jersey Superior Court in *Houseman v Dare* confirmed that family courts must not give custody of a pet to a person who may subject the animal to cruelty in contravention of the criminal law. It is arguable that a similar principle should be applied in the family courts in England and Wales due to the effect of section 4, Animal Welfare Act 2006 (AWA, 2006). Under this section, a person commits an offence if by their act or omission they cause a domestic animal to suffer unnecessarily and they knew, or ought reasonably to have known, that their action would have that effect.

There is considerable academic debate about whether animals can have legal rights (Francione, 2000; Posner, 2004; Wise, 2000). There have been a number of recent international cases seeking to challenge the property status of animals: in 2005²⁸ and again in 2011²⁹ courts in Brazil were asked to consider whether a captive chimpanzee could be a legal person so that an order of habeas corpus could be granted; in 2012 a court in California was asked to consider whether captive Orca whales had constitutional rights to protection from slavery³⁰ and more recently in 2013 a lawsuit was filed in New York State seeking an order of habeas corpus to remove a captive chimpanzee to a sanctuary.³¹ It is fascinating that the legal status of animals is being debated in the courts but since the legal status of domestic animals such as cats and dogs is unlikely to change in the foreseeable future, this article works within the confines of their current property status. There is widespread recognition that animals have interests (Singer, 1995) and as a sentient being it is in the interests of the pet not to suffer pain and injury. In a similar vein to Eekelaar’s classification of children’s interests, it is possible to classify different concerns relating to pets. The interest of a pet to avoid pain and suffering by avoiding injury, disease, and starvation can be seen as a basic interest. This means that the pet must not be subjected to unnecessary physical injury and must be fed an appropriate diet to avoid starvation and disease. As with a similar basic interest for children, this interest can be seen as reversing the usual owner–pet relationship in which the interests of the pet are subordinate to those of the owner. In creating laws that prohibit unnecessary cruelty to domestic animals society has prioritised this interest of animals over conflicting interests of the owner. Owners are not at liberty to promote their own interests at the expense of causing unnecessary suffering to their pet. An owner could smash their noisy radio if they were so inclined but not so their noisy dog.

Mnookin’s analysis of child residency disputes demonstrates how the nature of the adjudication in pet custody has similarities with child residency and it is not always a simple matter of property ownership. Mnookin analyses how child residency disputes, under the ‘best interests of the child’ test, differ from traditional types of adjudication because they require ‘person-oriented’ as opposed to ‘act-oriented’ determinations. Person-oriented determinations require an evaluation of ‘the whole person viewed as a social being’, whereas normally adjudication of disputes involves ‘application of act-oriented rules and thus avoids broad evaluation of a litigant as a social being’ (Mnookin, 1975: 251). Determining whether Ben has an easement over his neighbour’s land does not require the judge to make assessments of Ben as a social being (other than his credibility for

providing an honest testimony). There is no need to consider his education, occupation, work ethic, religion, etc. However, if we apply this analysis to pet custody disputes it can be seen that in some circumstances the disputes may require person-oriented determinations and consequently differ from other type of property disputes which are all governed by act-oriented determinations. The fact that the court may need to consider whether the person will harm the pet means the court must evaluate that person as a social being. This may not arise in many cases but nevertheless it serves to illustrate the complexity of pet custody disputes and the fact that they cannot always be resolved by a simple question of property title.

V. CONCLUSION

The nature of the law applied in child residency disputes has changed over the years. Mnookin (1975: 231) noted that 'In the past two centuries, we have moved from a pattern of treating a child as a possession or a "thing" to be owned to a much more child-centered mode of analysis. Parallel with this, previously sharp rules have dissolved, and controlling legal standards have become less specific.' He observed that as children's interests were seen increasingly as worthy of protection in their own right, there was a dramatic movement away from strict rules to a highly discretionary application of general principles of law. Similarly, it can be argued that as we better recognise the special relationship we have with our pets and the fact that many owners see pets as members of their family, the law needs to adapt and apply more suitable rules in determining pet residence disputes. Applying a rule in all cases of 'whoever adduces evidence of a better title to the pet will get custody' is too narrow and restrictive. It fails to appreciate the special nature of this unique type of property; the fact that it is living and sentient property and it fails to appreciate the consequences that flow from this fact: the interests of the animal to avoid physical injury and the existence of strong emotional bonds between the property and its owner. There are no reported cases in England and Wales to indicate the courts' likely approach but property law principles will undoubtedly play a significant role. This article has sought to identify 'other' considerations that are relevant to deciding pet residency disputes; considerations that may even prevail at times over property law principles. It has focused on the interest an animal has in avoiding physical injury and the close bond that can exist between a person and their pet although this is not an exhaustive list. By adapting theoretical tools from child law, this article has sought to demonstrate the underlying principles that justify these 'other' considerations.

Significantly, the standards used to decide pet custody disputes do more than affect the outcome of the small number of disputes that reach the courts. It also influences private negotiations between individuals outside of the court system. Presently, the focus on applying strict property law rules gives considerable bargaining power in private negotiations to the person with the better claim to title even though that person may have little regard for the animal. A clear statement of the relevant factors that can influence a decision needs to be provided either by a court or by legislation to assist those engaged in private negotiations as well as those contemplating court proceedings. In advocating the benefits of the welfare principle in disputes concerning children, Herring (2005) notes that the welfare principle is 'probably one of the most accurately understood legal principles among the general public'. Even though parents may disagree over what is in the best interests of their child, the very existence of the welfare principle serves to focus their minds on their child's welfare rather than their own rights. The fact that the welfare principle is so well understood means that it is easy to transpose a similar test in pet custody disputes. Such a test will not be as broad as the 'best interests of a child' test, which can include the wishes and feelings of the child, but it will have a wider scope than the application of property law principles alone. Having a test that includes aspects of the animal's welfare (at a minimum their need to be free of physical harm) will help owners to

focus on meeting the welfare needs of their pet rather than concentrating on their individual claims to title. Such a test more accurately reflects the status of pets as sentient beings who are valued companions and family members rather than mere items of property.

NOTES

1. After listening to my conference paper on pet custody at the SLSA conference, April 2013 one of the delegates contacted me with details of her own experience of a pet custody dispute.
2. 'Warring couples fight like cats and dogs over who gets the pets', <http://www.co-operative.coop/corporate/Press/Press-releases/Banking-Group/Warring-couples-fight-like-cats-and-dogs-over-who-gets-the-pets/>. The survey was conducted by The Co-operative Pet Insurance in May 2011 and questioned 2000 pet owners.
3. The fourth annual matrimonial survey of 100 of the UK's leading family lawyers undertaken by business advisers Grant Thornton in 2007 in S. Goodchild, 'Fights over pets: new trend in divorce cases', 30 April 2007, The New Zealand Herald, http://www.nzherald.co.nz/life-style/news/article.cfm?c_id%46&objectid%410436818.
4. 'Britain's dog owners spend thousands on pet custody', http://www.directline.com/about_us/news_030205x.htm. The survey was carried out by Direct Line Pet Insurance in January 2005 and questioned a representative sample of 750 dog owners.
5. A survey conducted in 2012 by the Pet Food Manufacturers Association found that 48 per cent of households in the UK have at least one pet (www.pfma.org.uk) and almost 8 million of these are dogs with a further 8 million cats. The survey was conducted by interviews with 2,159 adults who were a representative sample of households in the UK.
6. The Office for National Statistics, 'Divorces in England and Wales', 2011 estimates that 42 per cent of marriages in England and Wales end in divorce.
7. For example, domestic animals are treated as property in the Theft Acts 1968 and 1978 and s 1, Criminal Damage Act 1971. Sir W. Blackstone, Commentaries on the Laws of England, 1794, 12th edn, London: T. Cadell explains how the property status of animals developed historically due to the introduction of agriculture, which necessitated the vesting of property ownership in land and animals into the hands of individual people.
8. The survey by Direct Line Pet Insurance in 2005 found that 87 per cent of the dog owners saw their dog as a member of their family. http://www.directline.com/about_us/news_030205x.htm.
9. 613 S.W. 2d 565 (Tex. Civ. App. 1981).
10. Ibid. at 569.
11. 356 N.W.2d 611 (Iowa Ct. App. 1984).
12. Ibid. at 613.
13. Bennett v Bennett 655 So.2d 109, 110 (1995).
14. Ibid.
15. Ibid.
16. Raymond v Lachmann, 695 N.Y.S.2d 308, 309 (N.Y. App. Div. 1999).
17. Zovko v Gregory, No. CH 97-544 (Arlington County (Va.) Circuit Court, 17 October 1997).
18. Juelfs v Gough, 41 P.3d 593 (Alaska 2002).
19. Houseman v Dare 966 A.2d 24 (N.J. Super. Ct. App. Div. 2009).
20. Houseman was awarded \$1,500 being the full intrinsic value of the pedigree dog when it was purchased.
21. Ploni v Plonit, 18 March 2004 (unpublished) in the Ramat Gan Family Court. FC 32405/01.
22. Ibid.
23. 315 NYS 2d. 182 (1979).
24. 695 N.Y.S.2d 308, 309 (N.Y.App.Div. 1999).
25. 2009, Department for Environment, Food and Rural Affairs.
26. (1804) 5 East 221.
27. Juelfs v Gough, 41 P.3d 593 (Alaska 2002).
28. http://www.animallaw.info/nonus/pleadings/pb_pdf/Habeas%20Corpus%20on%20Behalf%20of%20a%20Chimp%20Rev2.pdf.
29. <http://www.telegraph.co.uk/news/worldnews/southamerica/brazil/8468083/Brazilian-court-denies-painting-chimpanzee-freedom-from-zoo.html>.
30. Tilikum v Sea World Parks & Entertainment Inc. [2012] 842 F.Supp.2d 1259.
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2.3 Challenges to the legal status of domestic and captive animals

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The property status of domestic and captive animals

The law distinguishes between ‘persons’ and ‘things’. Human beings are legal persons and in consequence enjoy certain fundamental rights such as freedom from torture and slavery. Domestic and captive animals are legal things and in consequence lack the capacity to possess legal rights. Legal personhood is not synonymous with human beings; it identifies those entities that are capable of having legal rights. Legal personhood can be a more restrictive category than ‘humans’ and has sometimes being denied to certain humans, for example, slaves, women, indigenous peoples. In other instances it can be a wider category which allows nonhuman entities to enjoy legal personhood; for example, a private company can be a legal person thereby allowing it to protect its property interests under the law. The question that has been asked recently in a number of courts across the globe is whether a captive animal such as an adult chimpanzee or orang-utan can be classed as a legal person. This is clearly a direct challenge to the current legal status of animals. There are also more indirect challenges arising in the courts; cases which highlight the fact that the current property status of domestic animals is inadequate to resolve certain disputes. Pet custody cases, to decide the residency of a family dog or cat following the breakdown of a relationship between a married or co-habiting couple, are an example of this. Using pure property law principles to decide the question of where the dog or cat lives is often inappropriate. Increasingly civil courts are being asked to recognise dogs and cats as a unique form of living and sentient property, different from inanimate property, and to thereby take the interests of the animal (not just the owners) into account. This also constitutes a challenge to the current legal status of domestic animals, but it is a more subtle and indirect challenge.

Pet custody cases

Cases to decide the residency of family pets, following the breakdown in a couple’s relationship, have been reported in a number of countries including the USA and Israel (Rook, 2014). What is so interesting about these cases is that they highlight the difficulty in applying pure property law to determine the question of a pet’s residency. Since the pet is property, the question of who gets to keep the pet will be decided on the same principles as who gets to keep the family TV or kitchen table. In some cases the courts have done this but in other cases the courts have recognised the unique nature of this living and sentient property and have taken other considerations into account. For example, in the case of *Raymond v Lachman* in 1999 the appeal court in New York reversed the earlier decision of the trial court which had awarded custody of a pet cat to the person with the better claim to property title, the cat’s owner. Instead the appeal court took into consideration the age and life expectancy of the ten year old cat and allowed it to “remain where he has lived, prospered, loved and been loved for the past four years”(695 N.Y.S.2d 308, 309 (N.Y.App.Div. 1999)). This case appears to take into account the interests of the animal itself and not merely the status of the animal as property. Although the outcome of the case may seem reasonable and just to a layperson, the case has significant implications at law because of its challenge to the pure property status of domestic animals. There have been a number of cases since 1999 adopting a similar

approach and Switzerland has even gone so far as to amend its Civil Code to provide a test that takes the interests of the animal into account in pet custody cases (Michel and Schneider Kayasseh, 2011).

Direct legal challenges to the property status of animals

Law, ethics and science are intricately linked in the question of the legal status of animals. The law reflects, or in some cases, helps to lead, changes in moral thinking about animals. Changes in moral thinking can arise from our greater understanding of animal behaviour and welfare through scientific discovery. For example, science has given humans a greater understanding of the cognitive and behavioural characteristics of chimpanzees which in turn led to concerns over whether the use of great apes in research was ethical. In 2010 the EU banned the use of great apes in scientific research (Directive 2010/63/EU).

Progress in scientific research has led to calls for a change in the legal status of some animals, such as great apes, from property to persons (Rook, 2009). However, others call for caution as the ramifications of granting some animals' legal personhood will be significant. Wise supports a change in legal status and advocates that any being with mental abilities adding up to what he calls 'practical autonomy' should be entitled to the basic legal rights of bodily integrity and bodily liberty (freedom from torture and slavery). A legal thing does not enjoy rights so this change would involve granting legal personhood to the relevant being so that they become a legal person. Wise defines practical autonomy as evident where a being "can desire; and can intentionally try to fulfil her desires; and possesses a sense of self-sufficiency to allow her to understand, even dimly, that it is she who wants something and it is she who is trying to get it" (Wise, 2000). He examines scientific research findings in relation to the cognitive abilities of great apes (chimpanzee, bonobo, gorilla and orang-utan) as well as Atlantic bottle-nosed dolphins and discovers that they are self-conscious, possess some of, or all, the elements required for a theory of mind and can solve complex problems (Wise, 2002). He concludes that these animals possess sufficient practical autonomy to be entitled to basic legal rights of bodily integrity and bodily liberty. Wise has put his theory into practice and in 2013 the Nonhuman Rights Project (a group founded by Wise) filed three lawsuits in the USA in relation to four captive adult chimpanzees in the hope that the courts will recognise the chimpanzees as legal persons. The case of Nonhuman Rights Project v Lavery concerns a chimpanzee called Tommy who is privately owned by Mr Lavery and lives alone in a cage at a used trailer lot. The Project seeks a court order to have him removed to a sanctuary where chimpanzees live in groups on a number of islands in an artificial lake. To be able to remove Tommy from his owner (who is not in breach of any state of federal laws) requires the court to grant a writ of habeas corpus. This court order can only be given in relation to a legal person and is not available for a legal thing. It's important to appreciate that in law a 'person' is not synonymous with a human being; it is a legal concept, not a biological one. For example, under English law a private company is a legal person and enjoys a right to the protection of its property under the Human Rights Act 1998.

The case was rejected at trial but went on appeal to the Supreme Court, Appellate Division which in 2014 also declined to grant a habeas corpus in respect of Tommy. The Supreme Court adopted a Contractualist approach which explains rights in terms of a social contract; a person enjoys the benefit of rights in return for submitting to societally-imposed responsibilities. Relying on the work of Cupp, the court held that "unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions" (Cupp, 2012). This is only one interpretation of legal rights and other theories do not rely on the reciprocity of rights and responsibilities. The Non-human Rights Project is pursuing an appeal to New York's highest court – the Court of Appeals. Wise draws hope from historical cases on the African slave trade to demonstrate how judges can make a decision to break the mould and permit the law to adapt to

changing moral climates. Tilikum is a bull orca whale who was captured off the East coast of Iceland in 1983. He was born wild and therefore was not property at birth; however, he became someone's property when he was captured by humans for the purpose of providing entertainment in captivity. Tilikum has lived in captivity for over 30 years and in 2012, when living at SeaWorld Orlando in Florida, he became the subject of a court case. The case alleged that five wild-captured orcas, including Tilikum, were being held by SeaWorld in violation of the Thirteenth Amendment to the Constitution of the United States, which prohibits slavery and involuntary servitude. It was argued that orca whales engage in complex social, communicative and cognitive behaviours and that their confinement in unnatural conditions at SeaWorld negatively impacts on their welfare. The court examined the wording of the Constitution in its historical setting to ascertain the purpose of those who drafted it. On this basis the court rejected the plaintiff's argument and stated that the Thirteenth Amendment only applies to humans because 'slavery' and 'involuntary servitude' are uniquely human activities which do not apply to nonhumans (*Tilikum, Katina, Corky, Kasatka and Ulises, five orcas by their Next Friends, People for the Ethical Treatment of Animals, inc v Sea World Parks & Entertainment Inc* (2012) 842 F. Supp.2d.1259).

The recent proliferation of cases making a direct challenge to the current legal status of captive animals demonstrates the strength of feeling driving this debate and indicates that there are interesting times ahead in deciding whether an animal can ever be a legal person.

The basis of a challenge to the legal status of animals - autonomy versus sentience

The USA is not the only country in which there have been legal challenges to the property status of animals. There have also been significant cases in Brazil, Argentina and Austria. Interestingly the cases so far have all been in relation to animals that possess what Wise calls 'practical autonomy' (Wise, 2000). It seems that the complex cognitive abilities of these animals may engender stronger feelings in humans of the need to ensure justice for these intelligent animals. Wise takes a pragmatic approach and argues that we are more likely to dismantle the thick legal wall that separates humans and animals, if the animal has practical autonomy. For Wise it is the cognitive abilities of the animal that are crucial. Whereas for others, sentience is enough. For Singer it is the sentience of the animal, the fact that it can experience pleasure and pain, which is crucial (Singer, 1995). According to Singer sentience is sufficient to require a rethink of how we treat animals. He develops the work of the famous 18th century philosopher, Bentham, who advocated the better treatment of animals and wrote: "the question is not, Can they reason? Nor Can they talk? But, Can they suffer?" (Bentham, 1780). Like Bentham before him, Singer is a utilitarian. In simple terms a utilitarian makes moral decisions by weighing the costs of a particular action against the benefits or satisfactions and then takes the option which brings the best balance of total benefits over total costs. The principle of equal consideration is an important concept for utilitarians and it requires that the interests of everyone affected by an action are taken into account and given the same weight as the *like interests* of any other being. This principle of equality prescribes how we should treat each other; it is a moral idea not a factual occurrence. Singer applies the principle of equal consideration to animals. Just as a person's IQ is irrelevant to their moral treatment – we don't give less consideration to the interests of those with a low IQ compared to those with a higher IQ - Singer argues that the cognitive abilities of animals should also be irrelevant to how we treat them. It doesn't matter whether an animal has complex intellectual abilities or not, what matters is whether it can suffer pain. Sentience is a pre-requisite to having interests and if a being suffers, Singer argues that "there can be no moral justification for refusing to take any suffering into consideration".

Utilitarianism in practice

Let's consider a simple practical example to illustrate this theory. Should someone living in the affluent West eat pig meat? This is a moral decision because the pig is sentient and has interests that can be harmed by being raised for meat, killed and eaten. For a utilitarian, making the decision of whether or not to eat pig meat involves weighing up the costs against the benefits to see if the benefits outweigh the costs. A difficulty soon becomes apparent; which costs and benefits are considered? The suffering of the pig is relevant; there is evidence that pigs suffer due to intensive farming practices, transport and pre-slaughter handling at the abattoir. But are there wider considerations such as the significant environmental costs of eating meat highlighted in the United Nation's report 'Livestock's Long Shadow' (Steinfeld *et al.*, 2006)? Is this a relevant factor to be weighed in the balance when someone is deciding whether or not to eat meat or is this cost too far removed? What are the benefits of eating the pig? Where there are healthy alternatives to meat, as in the West, thereby removing the need to eat meat for a balanced diet, then the benefits appear to be taste and cost; a person enjoys the taste of meat and, where it is produced by intensive farming methods, it is relatively cheap. For Singer the suffering of the pig in terms of physical pain, stress and the frustration of not being able to display natural behaviours all outweigh the benefit to the human and consequently a utilitarian will most likely decide not to eat pig meat. For Singer the sentience of the pig is sufficient to require equal consideration to be given to the suffering of the pig as would be given to the suffering of a person. Wise, however, would focus on the cognitive capacity of the pig and examine scientific research findings to ascertain whether a pig has practical autonomy deserving of the rights to freedom from torture and slavery.

Singer and Wise have their critics and one of the arguments against their theories is the idea that humans and animals are different and we are justified in treating animals differently and favouring our own kind (Posner, 2004). Imagine seeing a polar bear in Alaska about to kill a young seal. If we had the means to do so, would we intervene to save the seal? Most people would not intervene but would accept it as a natural event. The polar bear must eat the seal to survive. But what would happen if we saw a polar bear about to kill a human child? Now our response is likely to be very different. We would intervene to save the child even though polar bears must eat meat to survive. What accounts for this different response? This scenario illustrates the extent to which we favour our own species and will act to prevent harm to other humans even at the expense of animal suffering.

The concept of unnecessary suffering

The law faces a dilemma. How to deal with what Francione calls our 'moral schizophrenia' (Francione, 2004). On the one hand, humans now recognise the sentience of animals and there is a desire to protect animals from pain and suffering. But on the other hand, humans feel justified to use animals for our own benefit and as a consequence we accept what Francione calls 'the institutionalised exploitation' of millions of animals, for example, in factory farms, entertainment and scientific procedures. The law has developed a clever concept to deal with this dilemma; a concept whose success is demonstrated by the fact that it spans international boundaries. It is the concept of 'unnecessary suffering' and it is a pivotal concept in animal protection law across the world. Many countries have criminalised cruelty to animals, making it an offence to cause domestic and captive animals' unnecessary suffering. The concept of 'unnecessary suffering' prohibits suffering that is unnecessary but permits necessary suffering. Thus the test of necessity is crucial as it determines whether an offence has been committed. The act of hitting an animal may be an offence if it is unnecessary but a legal act if it is necessary; for example, in the English case in 1999 in which it was alleged that Mary Chipperfield (of the then famous Chipperfield Circus) had caused cruelty to a camel by hitting it with a broom handle, the Magistrate said that the force Mary had used was

necessary to train the camel to perform. Notably, in assessing necessity the Magistrate was not prepared to consider whether it was necessary for the camel to perform in a circus in the first place. It was held that no offence was committed on the facts because the suffering caused to the camel was deemed necessary to train it to perform.

Necessity as a balancing exercise

In England and Wales, the Animal Welfare Act 2006 governs the offence of cruelty to domestic animals. Under section 4 a person is guilty of the criminal offence of cruelty if their act (or failure to act) causes a protected animal to suffer unnecessarily and he/she knew or ought reasonably to have known that it would have that effect. Vets and lawyers both have a part to play in the concept of unnecessary suffering; it is for the vet to decide whether suffering has occurred and it is for the judge to determine the question of necessity. Suffering is a pre-requisite to the offence; without it there can be no offence so the role of the vet is crucial. Once suffering has been established by the vet, there are a number of statutory considerations set out in the Act for the court to consider such as whether the suffering could reasonably have been avoided or reduced and whether the conduct was that of a reasonably competent and humane person. These statutory considerations encapsulate a test that had been developed through case law under the Protection of Animals Act 1911, which preceded the Animal Welfare Act 2006. Case law established that there must be a legitimate purpose for the act which caused the animal suffering but a purpose on its own was not sufficient. There must also be proportionality between the purpose to be achieved and the means of achieving it. Proportionality is an important legal concept used in human rights law which involves a balancing exercise. In the case of *Ford v Wiley* in 1889 a farmer was alleged to have been cruel to his young cattle by cutting off their horns, close to the head, with a common saw. It was accepted by the court that the cattle suffered extreme and prolonged pain as a result of this procedure. The farmer justified his actions on the basis of cost and convenience. The court accepted that there was a legitimate purpose, but nevertheless cruelty was established because the purpose did not justify the means of achieving it. The court held that the suffering was completely disproportionate to the purpose and the practice was consequently found to be cruel and illegal. The problem with the concept of necessity is that it is subjective; it is for the court to decide on the respective weight to attach to the conflicting interests of humans and animals. In most cases a court is likely to give greater weight to the interests of humans.

The Israeli case in 2002 of *Noah v The Attorney General, et al.* is an excellent example of the subjectivity involved in assessing necessity (HCJ 9232/01, 215 Israeli Supreme Court). This case is unusual because, in the balancing exercise to decide necessity, the interests of the animals ultimately outweighed those of the humans; in practice this is rare. The case concerned the practice of producing foie gras by inserting a tube into the oesophagus of geese and force feeding them until their livers become abnormally large and fatty. The court had to consider whether this caused unnecessary suffering. Interestingly in reaching its decision the court was willing to examine the literature on the ethical theories applied to our treatment of animals and referred to the work of Singer and Francione. The court weighed in the balance the suffering caused to the geese by the method of force feeding against the benefit to humans of a food delicacy. The majority view of the court was that the suffering was not justifiable for a delicacy and therefore the suffering outweighed the benefit. The minority of the court felt that the suffering was necessary because of the suffering that any ban on foie gras production would cause to the farmers who would lose their livelihoods. More than 500 tonnes of foie gras was produced in Israel every year at that time and hundreds of farmers were dependent on the industry. This is a significant case for the promotion of animal welfare in agriculture. The English courts have been less willing to attach weight to the suffering of

the animal. The case of *Roberts v Ruggerio* in 1985 concerned the use of the veal calf crate system. Under this system of intensive farming, calves were individually confined in a narrow stall, chained at the neck and denied access to roughage in their diet. Roberts was the director of Compassion in World Farming which advocated that the use of veal crates caused the animals' unnecessary suffering and consequently the farmer was guilty of the offence of cruelty. The court took the view that it would only consider suffering beyond that which is to be expected from the use of the veal crate. It would not challenge the use of the veal crate itself even though there was evidence that it caused the calves suffering and that alternative practices were available to produce veal that caused the animals less suffering. Fortunately the veal crate has since been banned as being cruel, first in England and Wales, and more recently in Europe.

Property status and proportionality

For Francione the property status of animals is the root of the problem. He advocates that the concept of unnecessary suffering does not protect animals because the weighting to be attached to the respective interests of the animals and humans has already been predetermined by the property status of the animals. He states that "The property status of animals renders meaningless any balancing that is supposedly required under the humane treatment principle or animal welfare laws, because what we really balance are the interests of property owners against the interests of their animal property" (Francione, 2004). Therefore for Francione the choice as to which interests prevail in the balancing act has already been predetermined by the property status of the animal and this can only be remedied by giving animals the right not to be treated as our property. The Israeli foie gras case however shows that the interests of animals can sometimes trump humans although this is relatively rare.

Conclusion

Law, ethics and science are intricately linked in the debate surrounding the legal status of domestic and captive animals especially in relation to animals with higher cognitive abilities such as the great apes. There has been a wealth of scientific discovery around the cognitive and social abilities of great apes since the ground breaking work of Jane Goodall in the 1960s in the Gombe National Park, Tanzania (Goodall, 1971). There has been an explosion of ethical theories relating to our treatment of animals since Singer's ground breaking book 'Animal Liberation' in 1975 (Singer, 1995). The recent appearance and growth of legal challenges in the courts, both direct and indirect, to the property status of domestic and captive animals suggests that it is time for the law to respond and adapt to the developments in science and philosophy. It would seem that exciting times lie ahead for animal law.

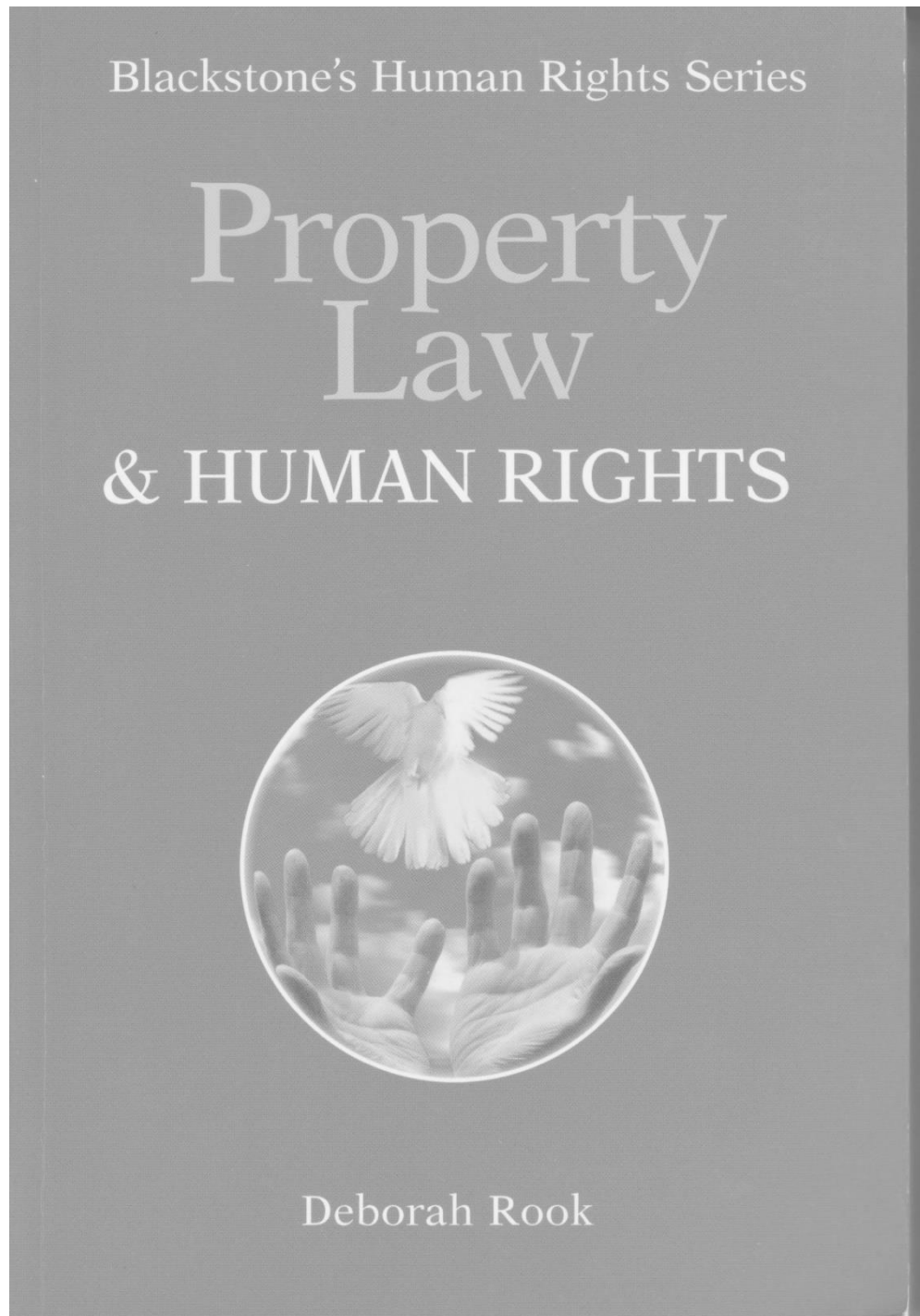
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Relevant extracts from my book (from chapter 4 on Article, 1 Protocol 1 and chapter 5 on Article 8) are included in this section of Portfolio component 1.



property rights and do not give a person a right to property which he or she does not already own. Nor does the guarantee for the right of property require the state to take measures to ensure that privately owned property is protected from a reduction in its value, for example, Article 1, Protocol 1 does not safeguard savings accounts by protecting them from a loss of value due to market forces (*X v Federal Republic of Germany* (App. No. 8724/79)). However, the guarantee does protect the 'peaceful enjoyment' of possessions which embraces the right to own, possess, use, lend or dispose of the property as one so desires without interference by the state. This is clearly a valuable protection for all property owners. However, it will be apparent later that the broad terms of the guarantee are subject to a number of significant limitations and exceptions that dilute the strength of the guarantee.

4.2 THE THREE DISTINCT RULES

In *Sporrong and Lönnroth v Sweden* (see Appendix 3) the European Court analysed the meaning and scope of Article 1, Protocol 1 in detail and identified the existence of 'three distinct rules' within its ambit. The European Court explained (at para. 61) that:

The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.

This analysis of Article 1, Protocol 1 as comprising three distinct rules has been consistently approved in subsequent cases and has become the established method of applying the Article. Although on some occasions the European Court has looked at Article 1 as a whole and has not identified which of the three rules is applicable, these instances are noticeably rare. Therefore Article 1, Protocol 1 will be examined as comprising the following three rules.

- (a) The first rule — this general rule provides the guarantee to the right of property. It protects a person's right to the peaceful enjoyment of his or her possessions free from any state interference.
- (b) The second rule — this is a limitation upon the wide scope of the first rule. It provides for circumstances in which a person may be deprived of his or her possessions by the state without invoking a breach of the first rule. The Strasbourg institutions have stated that there must be a narrow construc-

Chapter Four

Article 1, Protocol 1

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

4.1 A GUARANTEE FOR THE RIGHT OF PROPERTY

The essence of Article 1, Protocol 1 is that it provides a guarantee for the right of property.

The European Court of Human Rights (the European Court) has described this objective in the following terms:

By recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 is in substance guaranteeing the right of property. This is the clear impression left by the words 'possessions' and 'use of property' (in French: *biens, propriété, usage des biens*); the *travaux préparatoires*, for their part, confirm this unequivocally: the drafters continually spoke of 'right of property' or 'right to property' to describe the subject matter of the successive drafts which were the forerunners of the present Article 1 (*Marckx v Belgium*, at para. 63).

It provides both a positive guarantee to the peaceful enjoyment of possessions but also a negative guarantee that no one shall be deprived of their possessions by the state except in certain circumstances. These guarantees only protect existing

tion of the deprivation rule as it is a restriction on the general guarantee to the right of property contained in the first rule (*Lithgow v UK*).

- (c) The third rule — this provides another qualification to the guarantee of property rights provided in the first rule. It defines when a state may interfere with a person's peaceful enjoyment of his or her possessions by means of controlling the use of the property.

Although in *Sporrong and Lönnroth v Sweden* the European Court referred to 'three distinct rules', it is clear that the three rules are not unconnected. In the case of *James v UK* (see Appendix 3) the European Court clarified the relationship between the three rules in the following terms (at para. 37):

... before inquiring whether the first general rule has been complied with, [the Court] must determine whether the last two are applicable. The three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.

Since the second and third rules must be interpreted in the light of the first rule the state must, when depriving a person of possessions under the second rule or controlling the use of his or her property under the third rule, take account of the general principle concerning every person's right to the peaceful enjoyment of his or her possessions. Therefore the concession granted to the states under the second and third rules to interfere with property rights is restricted by the guarantee provided by the first rule. Similarly, the wide scope of the general guarantee to the right of property within the first rule is qualified and limited by the second and third rules. Consequently the three distinct rules are inextricably linked to each other.

The common approach adopted by the European Court when analysing cases under Article 1, Protocol 1 is first to determine whether either the second or third rule is applicable. Only if neither is applicable will the European Court return to the first rule and inquire whether it has been complied with. The same method of analysis will be adopted here.

4.3 THE SECOND RULE: THE DEPRIVATION OF POSSESSIONS

(See the case summaries in Appendix 3 for the following cases: *James v UK*; *Lithgow v UK*; *Howard v UK*; *Papamichalopoulos v Greece*; *Hentrich v France*; *Holy Monasteries v Greece*).

4.3.1 The meaning of 'deprivation'

A deprivation of possessions comprises a dispossession of the subject of property. It normally involves the transfer of ownership in the property so that the rights of the owner are extinguished. Examples from the case law of the Strasbourg institutions include:

- (a) the transfer of a landlord's freehold reversion to long leasehold tenants under the enfranchisement legislation (*James v UK*);
- (b) the compulsory purchase of land by a local planning authority (*Howard v UK*);
- (c) the nationalisation of industries (*Lithgow v UK*).

These examples, each comprising a transfer of ownership of the property, provide clear illustrations of a deprivation of possessions. However, there may be cases where there is no legal expropriation of the property and the owner thereby retains legal ownership of the property, but there is nevertheless a *de facto* expropriation. The European Court considered this possibility in the case of *Sporrong and Lönnroth v Sweden*. It recognised that the Convention is intended to guarantee property rights that are 'practical and effective' and therefore the European Court will look to the realities of the situation to determine whether or not there has been a *de facto* expropriation. In *Sporrong and Lönnroth* the European Court had to decide whether expropriation permits and prohibitions on construction in relation to the applicants' land imposed such limitations upon the applicants' right to property that they could be assimilated to a deprivation of property (see Appendix 3 for more details on the facts of this case). In the opinion of the European Court this was not the case. The European Court observed that the applicants were entitled to use, sell, donate or mortgage their properties. Although it was more difficult to sell the properties due to the imposed limitations, there was evidence that several sales had been completed in the area where the permits and prohibitions operated. On the facts the European Court found that there had been no deprivation within the ambit of the second rule.

Generally the European Court exercises considerable caution in accepting the existence of a *de facto* expropriation. *Papamichalopoulos v Greece* is a rare example of a case in which the European Court found that there had been a *de facto* expropriation. During the 1960s, in a time of a dictatorship in Greece, land owned by the applicants was occupied by the Navy Fund which subsequently constructed a naval base and holiday resort for officers on the land. Following the restoration of democracy in Greece, the authorities recognised the applicants' title to the disputed land but ordered that other land of equal value be given to the applicants in its place. However, the land chosen by the authorities for this exchange could not be used for that purpose and the applicants alleged a violation

proportionality. The applicants' land was expropriated by the state in order to build a new major road. The offending legislation created a presumption that the owners, whose land adjoined the new road, would derive an economic benefit from the building of the road and consequently their compensation was reduced to offset this presumed benefit. As a result of the application of this presumption as a blanket rule in all cases, the applicants were denied the opportunity to prove that they had suffered damage, or at least had not derived any benefit from the road, and thereby to assert their right to full compensation before the domestic courts. The European Court observed (at para. 54) that:

They thus had to bear a burden that was individual and excessive and could have been rendered legitimate only if they had had the possibility of proving their alleged damage and, if successful, of receiving the relevant compensation.

Consequently, the lack of due process rendered the state in violation of Article 1, Protocol 1.

4.4 THE THIRD RULE: CONTROLLING THE USE OF PROPERTY

(See the case summaries in Appendix 2 for the following cases: *Handyside v UK*; *AGOSI v UK*; *Gillow v UK*; *Tre Traktörer Aktiebolag v Sweden*; *Pine Valley Developments Ltd and others v Ireland*; *Air Canada v UK*; *Gasus Dosier- und Fordertechnik GmbH v Netherlands*; *National and Provincial Building Society and others v UK*.)

4.4.1 The meaning of 'control the use of property'

The third rule deals with situations where the state interferes with a person's right of property by controlling the use of the property. For example, where the state imposes restrictions on the use of land due to planning controls or for environmental reasons, this is likely to involve a control of use within the scope of the third rule. The distinction between a deprivation and a control of use has at times drawn a fine line. It is advantageous to an applicant to be able to establish a deprivation rather than merely a control of use because it raises a presumption for the payment of compensation (see 4.6.5). One commentator has suggested that the distinction between deprivation and control in the Convention case law is 'an untidy and unsatisfactory one'.⁵ Anderson observes that:

⁵ Anderson, D., 'Compensation for Interference with Property', [1999] EHRLR 543 at p. 553.

In many of the cases ... the Court has bent over backwards to avoid classifying an interference with property as a deprivation. That is, no doubt, at least partly because of the presumption that compensation must be paid when a person is deprived of property.⁶

Therefore where the European Court considers that the facts do not give rise to a situation deserving of compensation, it may seek to classify an interference as a control rather than as a deprivation so that it retains the discretion to judge, on the merits of the case, whether the absence of compensation is acceptable or not.

The examples below, from the decisions of the Strasbourg institutions, illustrate instances where the interference was found to be a control of use and, in appropriate cases, examine the reasons given for applying the third rule instead of the second rule.

4.4.1.1 Restricting the purposes for which the property can be used

In *Pine Valley Developments Ltd v Ireland*, the applicants contended that there had been a deprivation of their possessions because the outline planning permission for the land they had purchased had subsequently been declared a nullity by the Irish Supreme Court. This meant that the applicants could not use their land for industrial purposes as they had intended and this resulted in a significant reduction in the value of their land. The European Court found no evidence of a formal expropriation nor of a *de facto* deprivation. The factors that were relevant to the European Court in reaching this decision included the following:

- (a) the applicants retained ownership of the land;
- (b) although the land could not be used for industrial development, it could be used for alternative means such as agricultural purposes;
- (c) although the value of the site was substantially reduced, it was not rendered worthless.

On this basis the European Court decided that the interference came within the ambit of the third rule and was a control of use of the property instead of a deprivation under the second rule.

Similarly, in *Sporrong and Lönnroth v Sweden* the European Court decided that the prohibitions on construction amounted to a control of use. However, the expropriation permits that had been issued by the Government to the Stockholm City Council, which permitted the Council to effect expropriation within a specified period should it wish to do so, did not control the use of the property. The permits placed no restrictions on the owners' use of their property prior to any expropriation and consequently the third rule was not applicable to them (see 4.5).

⁶ *Ibid.*

4.4.1.2 Restricting the persons who can use the property

In *Gillow v UK* the property was used for residential purposes. The state restriction did not prevent use as a residence but did prevent the owners from being able to live in their property. They had been denied the requisite residence licence required to live in Guernsey. The legislation did not deprive them of their ownership of the house and they could still sell it or rent it to tenants so there was clearly no deprivation within the ambit of the second rule. Instead the European Court found there to be a control of use under the third rule because the owners were prevented from using the property as their own residence.

4.4.1.3 The imposition of positive obligations on the land owner

In *Denev v Sweden* (1989) 59 DR 127 the applicant, an owner of land which included a forest, was required by the state authorities to plant 2,500 Swedish pine trees per hectare evenly distributed over the forest on his land. He maintained that he intended to plant other types of trees as part of ongoing scientific experiments that he had been conducting over a seven-year period. The European Commission decided that the measures constituted a control of use of the property within the ambit of the third rule thereby making it clear that the imposition of positive obligations on the owner of property can amount to a control of use of property for the purposes of the third rule.

4.4.1.4 Inheritance law restrictions

Marckx v Belgium concerned discriminatory legislation relating to inheritance rights on intestacy. The European Court recognised (at para. 63) that: 'The right to dispose of one's property constitutes a traditional and fundamental aspect of the right to property'. Therefore restrictions on inheritance laws will be an interference with property rights by means of a control of use under the third rule.

4.4.1.5 Modifying or extinguishing freehold covenants

In *S v UK* (App. No. 10741/84) an order by the Lands Tribunal extinguishing two freehold covenants was found to amount to a control of use under the third rule (see 8.6 for a further explanation of this case).

4.4.1.6 The loss of certain exclusive rights over land

In *Banér v Sweden* (App. No. 11763/85) a landowner's loss of exclusive fishing rights on his estate, as a result of new legislation giving the general public a right to fish in privately owned waters, was held to constitute a control of use rather than a deprivation. Similarly, in *Chassagnou and others v France* (App. Nos. 25088/94, 28331/95 and 28443/95, 29 April 1999) the landowners were required by statute to transfer their right to hunt, which was one attribute of their right to property, to a municipal hunters association so that all of the members of the association could utilise the land for hunting purposes. The applicants had thus

lost their exclusive right to hunt on their land. In fact the applicants all objected to hunting and consequently the only thing they had lost was the right to prevent other persons from hunting on their land. The European Court stated (at para. 74) that:

The compulsory transfer of the hunting rights over their land to [a municipal hunters association] prevents them from making use of their right to hunt, which is directly linked to the right of property, as they see fit. In the present case the applicants do not wish to hunt on their land and object to the fact that others may come onto their land to hunt. However, although opposed to hunting on ethical grounds, they are obliged to tolerate the presence of armed men and gun dogs on their land every year. This restriction on the free exercise of the right of use undoubtedly constitutes an interference with the applicants' enjoyment of their rights as the owners of property. Accordingly, the second paragraph of Article 1 is applicable in the case.

Therefore the landowners' loss of the exclusive right to hunt on their land constituted a control of use of property under the third rule.

4.4.1.7 The revocation of licences affecting business interests

In *Traktörer Aktiebolag v Sweden* concerned the state's revocation of the applicant company's licence to sell alcoholic beverages in its restaurant. The European Court examined the complaint under the third rule rather than the second. Although the applicant could not operate a restaurant business, it still kept some economic interests in the property represented by the leasing of the premises and the property assets contained within it. The European Court therefore concluded that the third rule was the applicable rule since the interference restricted the use of the property by preventing the sale of alcoholic beverages upon it. Similarly in *Fredin v Sweden* (1991) 13 EHRR 784, the applicant's licence to extract gravel, which had been revoked reliant upon a nature conservation law, was considered by the European Court to constitute a control of use rather than a deprivation. These decisions indicate that the revocation of a licence will be treated as a control of use rather than as a deprivation, the control being directed, not to the actual licence itself, but rather to the applicant's underlying business interests.⁷

4.4.1.8 Forfeiture and confiscation

In *Air Canada v UK*, customs officers found a consignment of cannabis resin on board an Air Canada airliner and seized the aircraft as liable to forfeiture. The applicant was required to pay the sum of £50,000 for its return. The applicant contended that it had been deprived of its possessions (a temporary deprivation of

⁷ Also see the European Commission's decision in *Pinnacle Meat Processors v UK* (App. No. 33298/96).

the aircraft and a permanent deprivation of £50,000) within the ambit of the second rule. However the European Court decided that the interference amounted to a control of use under the third rule. The legislation in question, which prevented the aircraft from being used as a means of transporting illegal drugs, clearly sought to control the use of the aircraft. Since the forfeiture of the aircraft was a measure taken in furtherance of that policy, it amounted to a control of use and not a deprivation of property. A similar approach had been taken in the earlier case of *AGOSI v UK* in which customs and excise officers had seized illegally imported gold coins. The owner of the gold coins, being innocent of any wrongdoing in connection with the illegal activity, alleged that it had been deprived of its possessions by the state. The European Court noted that the prohibition on importing gold coins into the UK was a control of use of property and that the forfeiture of the gold coins was a measure taken to enforce that prohibition. It stated (at para. 51) that:

The forfeiture of the coins did, of course, involve a deprivation of property, but in the circumstances the deprivation formed a constituent element of the procedure for the control of the use in the United Kingdom of gold coins.

Thus it concluded that the applicable rule was the third rule.

4.4.1.9 The seizure of property to satisfy tax debts

In *Gasus Dosier- und Fordertechnik GmbH v Netherlands*, the applicant, a German company, remained the owner of goods that it had sold to a Dutch company under a retention of title clause. The goods were seized by the tax bailiff to satisfy the Dutch company's tax debts. The applicant alleged that it had been deprived of its possessions in breach of Article 1, Protocol 1. However the European Court noted that the interference with the applicant's property arose as a direct result of the tax authorities' exercise of their powers of enforcement in respect of unpaid tax debts. The Dutch legislation permitted the seizure of all movable goods on the debtor's premises irrespective of who actually owned those goods. Therefore the European Court chose to deal with the applicant's complaint under the head of 'securing the payment of taxes' within the scope of the third rule.

4.4.2 The meaning of 'in accordance with the general interest'

The requirement that the interference with the use of property is 'in accordance with the general interest' has a similar purpose to the requirement under the second rule that any deprivation of property is made 'in the public interest'. In both cases the state needs to show that the interference is in pursuance of a legitimate aim that benefits the community at large (see 2.4). The examples given

under the second rule (see 4.3.3) are equally applicable here. Further examples from the case law of the Strasbourg institutions include the following.

- (a) The protection of the environment has been found to be a legitimate aim under the third rule (*Pine Valley Developments Ltd and others v Ireland*). In support of this the European Commission has observed that: 'the interest of preserving nature is commonly recognised in all the Contracting States as being of great importance in present-day society and this interest cannot be effectively protected without restricting the use of property' (*Fredin v Sweden* (1991) 13 EHRR 784 at para. 69).
- (b) Measures taken to avoid unregulated hunting on land and to encourage the rational management of game stocks were found to be in the general interest (*Chassagnou and others v France*).
- (c) Measures taken to combat international drug trafficking have been regarded as being in the general interest (*Air Canada v UK*).
- (d) Measures to restrict the consumption and abuse of alcohol have been found to come within the general interest (*Te Traktörer Aktiebolag v Sweden*).
- (e) The protection of morality was held to fall within the concept of the general interest in a case involving the destruction of school books adjudged to be obscene due to the pornographic nature of the books (*Handyside v UK*).

The 'protection of morals' raises the question of what is a 'moral' and thereby opens the door to complex philosophical debates on morality. To this end it is notable that in *Handyside v UK* the European Court was careful to sidestep any such debate by leaving the issue of what constitutes a moral to the state's margin of appreciation. It stated (at para. 48) that:

It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements.

4.4.2.1 Is there any difference between 'public interest' (the second rule) and 'general interest' (the third rule)?

It is unclear whether there is any difference between these two phrases (see 4.6.2). Any debate over the possible differing scope of these phrases is probably futile as it is extremely unlikely that the Strasbourg institutions will dispute a legitimate

aim put forward by a state. As with the second rule, the deciding factor under the third rule is likely to be the principle of proportionality.

4.4.3 The principle of proportionality

This raises the same issues that have already been examined in respect of proportionality under the second rule (see 4.3.6). The European Court has confirmed the application of this principle within the context of the third rule and has stated that:

an interference must achieve a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aim pursued (*Air Canada v UK*, at para. 36).

As always the states are permitted a margin of appreciation in implementing the fair balance test, but this is subject to the European Court's power of review.

In assessing proportionality the European Court takes into account different competing factors and weighs them in the balance to ensure that the property owner does not suffer an excessive burden. In this respect the European Court has consistently recognised the importance of the compensation factor and the due process factor which apply to both the second and third rule (see 4.3.6 and 4.4.3.2 respectively). Another factor, relevant to proportionality, but specific to the third rule, is the purpose for which the owner intends to use the property.

4.4.3.1 The intended use of the property

The European Commission has recognised the importance of the purpose for which the owner intends to use the property in the following terms: 'The principal criterion for establishing whether a fair balance has now been struck in the control of use of personal property is therefore the use for which that property was intended by the individual owner' (*Gillow v UK*, para. 147). In *Gillow v UK* the owners intended to use the property as their own residence but were prevented from doing so by the refusal of the relevant state authority to grant them a residence licence. The property could still be lived in by other people, but it was the fact that the owners intended to use the property for their own home that was the crucial factor in assessing proportionality. This factor had considerable weight in balancing, on the one hand, the benefit to the Guernsey community of a residence licence system to prevent a housing shortage for locals and, on the other hand, protecting the right of the owners to enjoy the use of their property without interference from the state. Therefore, when assessing proportionality under the

third rule, the interference with the use of the property must be considered in the light of the purpose for which the owner intended to use the property and the ways in which the property can still be used.

In *Chassagnou and others v France* the European Court concluded that the compulsory transfer of the applicants' hunting rights over their land to a municipal hunters association upset the fair balance to be struck between the requirements of the general interest and the protection of the right of property. It was significant that the applicants were opposed to hunting on ethical grounds and therefore did not want their land used for hunting purposes. The European Court observed (at para. 85) that:

Compelling small landowners to transfer hunting rights over their land so that others can make use of them in a way which is totally incompatible with their beliefs imposes a disproportionate burden which is not justified under the second paragraph of Article 1 of Protocol 1.

This is particularly interesting because the owners' anti-hunting beliefs were a relevant factor in ascertaining the intended use of the property (i.e. for something other than hunting) and thereby in assessing proportionality.

4.4.3.2 Compensation and proportionality under the third rule

Control of use is a less serious interference with property than a deprivation and therefore the need to provide compensation is not as great under the third rule. In *Humér v Sweden* (App. No. 11763/85) the European Commission referred to the principle that, where a deprivation of possessions has occurred, there is normally an inherent right to compensation. However, it went on to observe that:

In the Commission's view such a right to compensation is not inherent in the second paragraph ... This does not exclude that the law may provide for compensation in cases where a regulation of use may have severe economic consequences to the detriment of the property owner.

As with the second rule there is no guarantee that an owner will receive full compensation for the state's interference. Under the second rule the owner can expect to receive some compensation in all but 'exceptional circumstances', but the position under the third rule is more precarious for the owner. The European Commission has stated that a control of use 'does not, as a rule, contain any right to compensation' (*Pinnacle Meat Processors v UK* (App. No. 33298/96)).

Nevertheless, the European Commission in *Banér* did acknowledge that compensation will be a relevant factor in assessing proportionality in some cases. There may be reasons to justify denying any payment of compensation on the facts. For example, in *Pine Valley Developments Ltd and others v Ireland* there

was found to be no violation of Article 1, Protocol 1 under the third rule following the national court's declaration that the applicants' outline planning permission was a nullity, even though the applicants had not received any compensation. The European Court observed (at para. 59) that:

The applicants were engaged on a commercial venture which, by its very nature, involved an element of risk and they were aware not only of the zoning plan but also of the opposition of the local authority ... to any departure from it. This being so, the Court does not consider that the annulment of the permission without any remedial action being taken in their favour can be regarded as a disproportionate measure.

Similarly, in *Banér v Sweden* (App. No. 11763/85) the absence of any compensation in relation to the applicant's loss of his exclusive rights to fish in his lake, was not sufficient to contravene the principle of proportionality. The European Commission took into account the fact that he could not claim any direct loss of income as a result of the state interference, which was, in the opinion of the European Commission, a relatively minor interference with his property rights. For comparative purposes it is interesting to observe that a similar approach has been adopted by the Irish courts interpreting the Irish Constitution. Legislation which limited a landowner's use of his land in the interests of protecting national monuments was found to be constitutional (*O'Callaghan v Commissioner of Public Works* [1985] ILRM 364). In reaching its decision the Irish court took the view that the payment of compensation is not necessary when property rights are interfered with by controlling the use of the land.

There is a well-recognised category of cases which involve a control of use by the state but for which the owner will definitely not receive any compensation. This is where the state is exercising a type of 'police power' over the property (see 4.4.3.4). For example, where property is forfeited because it has been used in the commission of a criminal offence (*AGOSI v UK; Air Canada v UK*). In these types of cases, and in cases where the state seizes property to execute a civil judgment or satisfy a tax debt (*Gasus Dosier- und Fordertechnik GmbH v Netherlands*), the purpose of the interference with the property would be frustrated if compensation were payable. Therefore in these cases the emphasis in assessing proportionality rests on due process considerations (see 4.4.3.5).

4.4.3.3 Comparative analysis

The question of the payment of compensation under the third rule is likely to provoke fierce debate. Given the uncertainty, it may be helpful to consider briefly the position in the USA and Commonwealth countries for comparative purposes. Under the US Bill of Rights, the takings clause of the Fifth Amendment provides for the payment of full compensation in all cases where property is expropriated by the state. The due process clause of the Fourteenth Amendment deals with the

regulatory control of land, similar to the third rule under Article 1, Protocol 1. Originally it was considered that a regulation of the use of property was not compensatable but was subject only to the procedural safeguards under the due process clause. The statement that 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law' is illustrative of the judicial attitude at that time.⁸ However, in *Pennsylvania Coal v Mahon* (1922) 260 US 393, the Supreme Court recognised that, in some circumstances, a statute which restricts or regulates the use of property can amount to a taking of land. Holmes J stated that: 'The general rule at least is that while property may be regulated to a certain extent if the regulation goes too far it will be recognised as a taking'. The decisions in *Mahon* and subsequent cases have thus blurred the edges of the initial distinction between a 'taking' and a 'control' by treating regulatory control as a compensatable taking under the Fifth Amendment in certain circumstances. Any attempt to delineate precisely between a compensatable regulation and one that is not compensatable has been unsuccessful to date and the area is consequently shrouded in considerable ambiguity.⁹ For example, the controversial test proffered in *Lucas v South Carolina Coastal Council* (1992) 505 US 1003 has been the subject of extensive criticism.¹⁰ In *Lucas* the court adopted an economic value approach to ascertain whether the regulation 'deprives land of all economically beneficial use' and, if it does, the regulation will be treated as a taking and compensation must be paid.

In a number of Commonwealth Privy Council decisions, British judges have approved the basic principle in *Mahon* that the regulation of property can be a compensatable acquisition, although some have suggested that to refer to a 'valueless shell', i.e. the loss of virtually all economic value in the property, is to overstate the situation needed for there to be a constructive deprivation (*La Compagnie Sucrière de Bel Ombre Ltee v The Government of Mauritius* [1995] 3 LRC 494 at 506 per Lord Woolf). The case of *La Compagnie Sucrière* concerned legislation in Mauritius that required landowners to renew leases with tenant farmers. The Privy Council rejected the landowners' claim that the legislation deprived them of their property without compensation contrary to the Mauritian Constitution. Analysing this decision, Allen observed that:

the Privy Council refused to treat restrictions on a landlord's freedom to deal with land after the expiry of a lease as an acquisition of property. Instead, Lord Woolf said that the restrictions were analogous to a control on use, under Rule 3 of the Protocol. It seems

⁸ *Pennsylvania Coal v Mahon* (1922) 260 US 393 per Holmes J.

⁹ See Purdue, M., 'When a Regulation of Land becomes a Taking of Land — A Look at Two Recent Decisions of the United States Supreme Court' [1995] JPL 279.

¹⁰ See Willmore, C., 'Of missiles and mice: property rights in the USA' in Cooke, E., (ed), *Modern Studies in Property Law, Volume 1: Property 2000*, Oxford: Hart Publishing, 2001.

Privy Council dismissed the teachers' appeal. Since the benefits enjoyed by the teachers were no more than lost opportunities or expectations, they did not acquire proprietary status and consequently the RCEA teachers had suffered no deprivation of their possessions.²²

4.8 THE MEANING OF 'EVERY NATURAL AND LEGAL PERSON'

In comparing Article 1, Protocol 1 with the other rights enunciated in the Convention, an important difference can be identified. The right to property is the only Convention right that is expressly conferred on 'legal' as well as 'natural' persons. Therefore Article 1, Protocol 1 protects the property rights of companies. It may seem strange to include companies in the human rights arena, nevertheless the contracting states have chosen to confer on companies the protection of the human right which protects existing property rights. Presumably this relates to the fact that the property belonging to the company is ultimately owned by natural persons. This abstraction works to simplify the law by removing the need to identify which natural persons own the property concerned. However, to be able to invoke the protection of Article 1, Protocol 1, the company must be a 'victim' of the alleged violation. For a discussion of victim status and its application to companies see 2.7.3.

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

4.1 THE SCOPE OF ARTICLE 8 FOR PROPERTY LAWYERS

The structure of Article 8 is a familiar one for the Convention Articles with the first paragraph broadly defining the rights to be protected and the second paragraph setting the boundaries for a legitimate interference with those rights by the state. For a property lawyer the relevant aspect of Article 8 is likely to be the right to respect for the home and this will be considered in detail in this chapter. The protection of the home will inevitably involve some overlap with family life and private life, but these aspects of Article 8 will only be considered in so far as they relate to the home.

The protection afforded to the home under Article 8 includes the following.

- (a) A right of access to the home.
- (b) A right of occupation of the home. This embraces the notion of a right to the peaceful enjoyment of occupation of the home and consequently raises issues concerning excessive noise and other environmental pollution that affects the home.

²² Ibid., p. 1340 at para. 18.138.

- (c) A right not to be expelled or evicted from the home.
- (d) Protection against an intrusion into the home by the state in order to arrest, search, seize or inspect.

5.2 ARTICLE 8(1): THE RIGHT TO RESPECT FOR THE HOME

(See the case summaries in Appendix 3 for the following cases: *Marckx v Belgium*; *S v UK*; *Gillow v UK*; *Buckle v UK*; *Lotzidou v Turkey*; *Khattun and others v UK*).

5.2.1 The meaning of 'respect' — the imposition of positive obligations on the state

The European Court of Human Rights (the European Court) in *Marckx v Belgium* sought to clarify the meaning and purport of the words 'respect for ... private and family life'. Although the European Court limited its consideration to private and family life, the meaning of 'respect' applies equally to respect for the home. The European Court relied upon its analysis of Article 8 in the *Belgian Linguistic Case* (No. 2) (1968) 1 EHRR 252 in which the European Court, whilst recognising the object of Article 8 to be that of protecting individuals against arbitrary interference by public authorities, stated (at para. 31) that: 'Nevertheless, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life'. Therefore, as early as 1968 the European Court had recognised the existence of positive obligations stemming from the word 'respect' in Article 8(1), in addition to the negative obligations imposed upon the states under Article 8(2) to abstain from certain action.

The question of the states' positive obligations under Article 8(1) arose most recently in the case of *X, Y and Z v UK* (1997) 24 EHRR 143. The question for determination by the European Court was whether Article 8 implies a positive obligation on a state to recognise formally, as the father of a child, a person who is not the child's biological father. The relevance to property lawyers is the consideration of the extent of a state's positive duty under Article 8. The European Court made the following statement (at para. 41):

The court reiterates that, although the essential object of Article 8 is to protect the individual against arbitrary interferences by the public authorities, there may in addition be positive obligations inherent in an effective respect for private or family life. The boundaries between the State's positive and negative obligations under this provision do not always lend themselves to precise definition: nonetheless, the applicable principles are similar. In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in both cases the State enjoys a certain margin of appreciation.

Consequently, there is a clear recognition that Article 8(1) does impose positive obligations upon the state to take steps, in certain instances, to protect an individual's right to respect for his or her home and private life.

Whilst the negative obligation under Article 8(2) is limited to non-interference by the state, the scope of the positive duty remains undefined. The case of *X and Y v Netherlands* (1985) 8 EHRR 235 made a significant inroad into defining the scope of this positive duty. The facts concerned the lack of criminal sanctions for the sexual abuse of a 16-year-old mentally handicapped girl. The European Court repeated the *Marckx* formula that the right to respect for family and private life under Article 8 may impose positive obligations upon the state. However, the European Court went one step further and stated (at para. 23) that: 'These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves' (emphasis supplied). The full implication of this statement is not yet known. There is uncertainty as to the extent to which a state is obliged to take positive action to prevent violations of human rights between private individuals. This case confirms that the fact that a violator is a private individual does not necessarily mean that his or her actions fall outside the scope of Article 8. In *X and Y v The Netherlands* it was the state's failure to provide adequate protection, under domestic law, for a victim who had been abused by another private individual, that constituted the state's breach of Article 8. In response to that decision by the European Court, Clapham concludes that: 'Article 8 can now be said to have been interpreted so that the reference to "public" in paragraph (2) does not prevent the application of paragraph (1) to both public and private actions'.¹

In seeking to define the nature of these positive obligations imposed upon the states Harris, O'Boyle and Warbrick suggest that they could involve the following:

- (a) the obligation of the authorities to take steps to make sure that the enjoyment of the right is effective;
- (b) the obligation of the authorities to take steps to make sure that the enjoyment of the right is not interfered with by other private persons; and
- (c) the obligation of the authorities to take steps to make sure that private persons take steps to ensure the effective enjoyment by other individuals of the right.²

Potentially the boundaries of the states' positive obligations could be very extensive were it not for the fact that these obligations are subject to a significant

¹ Clapham, A., *Human Rights in the Private Sphere*, Oxford: Clarendon Press, 1993 at p. 214.
² Harris, D. J., O'Boyle, M. and Warbrick, C., *Law of the European Convention on Human Rights*, London: Butterworths, 1995 at p. 284.

restriction. The concessions within Article 8(2), which define when a state can interfere with a person's respect for his or her home without being in breach of Article 8(1), limit the scope of the states' positive obligations under Article 8(1) (see § 3.1).

The case of *Botta v Italy* (1998) 26 EHRR 241 illustrates the difficulties of establishing that a state has a duty to take positive action. The applicant went on holiday to a seaside resort. He discovered that the bathing establishments were not equipped with disabled facilities, as required by Italian legislation, and this prevented him from being able to access the beach and sea. He alleged that his private life had been impaired, in violation of Article 8, due to the state's failure to discharge its positive obligations to monitor compliance with domestic legislation in relation to the availability of disabled facilities at private beaches. The European Commission adopted the view that the right asserted by the applicant, involving the participation of disabled persons in leisure activities, was so broad in scope that it went beyond the concept of a legal obligation inherent in the idea of 'respect' for private life. The European Court reached the same conclusion. In its submission to the European Court, the Government had expressed its concern that to define the boundaries of the states' positive obligations to include the satisfactory development of each individual's recreational activities would open the floodgates. It argued (at para. 29) that:

Once the door was open for a development of that type it would be extremely difficult to set limits. It would be necessary, for example, to take into consideration obstacles resulting from the insufficient means of those who wished to take part in such activities.

The European Court responded to this floodgates concern by devising an appropriate test to limit the scope of the states' positive obligations. It stated that for positive obligations to be imposed upon the state there must be 'a direct and immediate link between the measures sought by an applicant and the latter's private and/or family life' (para. 34). A direct and immediate link had been established in the cases of *Lopez Ostra v Spain* and *Guerra and others v Italy* (see Appendix 3), but in the instant case the European Court concluded (at para. 35) that:

the right asserted by Botta, namely the right to gain access to the beach and the sea at a place distant from his normal place of residence during his holidays, concerns interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the State was urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life. Accordingly, Article 8 is not applicable.

The case illustrates that, although the scope of the states' positive obligations remains uncertain, the European Court will impose limitations and has devised the 'direct and immediate link' test for this purpose.

The extent to which the state is under a positive obligation to take steps to protect the right to respect for a person's home has been considered in relation to environmental pollution affecting the home. There have been a number of cases involving noise pollution from aircraft and motorways (*Powell and Rayner v UK*, *Arundelle v UK* and *Hutton v UK*) and cases concerning pollution caused by hazardous emissions from privately owned factories (*Lopez Ostra v Spain* and *Guerra and others v Italy*). These cases will be examined at 5.3.1 and at 8.8. These positive obligations have also been found to arise in relation to acts of harassment and vandalism directed against the home and private life (see *Osman v UK* (1998) 29 EHRR 245).

3.1.1 The meaning of 'home'

In *Buckley v UK* the applicant, a gypsy, lived in caravans parked on land which she owned. She applied for retrospective planning permission to permit her to park her caravans on her land. Her application was refused by the local planning authority, which issued an enforcement notice requiring her to remove the caravans. She was later prosecuted for failing to comply with the enforcement notice. The European Court had to establish whether the land in question constituted her 'home' for the purposes of Article 8. The Government contended that since she had no planning permission for her caravans she had not established a legal 'home'. But the European Court rejected this submission. Despite the fact that she was in violation of national law by living in the caravans without planning permission, it was still her 'home'. She had purchased the land specifically to park her caravans there and she had lived there continuously for the preceding eight years without attempting to make a home elsewhere. The European Court, in applying the 'sufficient and continuous links' test expounded in *Gillow v UK* (see Appendix 3), was satisfied that the property was her home.

The 'sufficient and continuous links' test was also applied in the case of *Mabey v UK* (1996) 22 EHRR CD 123, which also concerned a local authority's refusal to grant planning permission for the applicant's caravan where he had lived for over 20 years. The European Commission stated (at p. 124):

whether or not a particular habitation constitutes a 'home' for the purposes of Article 8(1) will depend on the factual circumstances, of the particular case, namely the existence of sufficient and continuous links. It is not limited necessarily to those homes which have been lawfully occupied or lawfully established.

Having regard to the length of his occupation in the caravan the European Commission was satisfied that it was his home.

The two cases, *Buckley v UK* and *Mabey v UK*, indicate that a caravan is capable of constituting a 'home' and therefore it may be expected that Article 8

will extend its protection to other forms of mobile shelter. In *Kanthak v Germany* (1988) 58 DR 94, the European Commission left open the question of whether a camper van parked on a public road could be a person's 'home' under Article 8. However, applying the test expounded in *Gillow*, there appears to be no reason why a camper van could not constitute a home provided that 'sufficient and continuous links' exist.

In *Loizidou v Turkey* the applicant owned land in northern Cyprus, where she had grown up and where her family had lived for generations. She had not lived there since 1972 having moved away when she got married. However, in 1974 construction work began on a number of flats on the land. The applicant had intended to live in one of the flats but due to the Turkish occupation of Northern Cyprus in 1974 the construction works had not been completed. The Turkish forces, still occupying Northern Cyprus, prevented her from returning to her land. She alleged that this constituted an unjustified interference with her right to respect for her home in violation of Article 8. The European Court stated (at para. 66) that:

In its opinion it would strain the meaning of the notion of 'home' in Article 8 to extend it to comprise property on which it is planned to build a house for residential purposes. Nor can that term be interpreted to cover an area of a state where one has grown up and where the family has its roots but where one no longer lives.

This was clearly distinguishable from *Gillow v UK* where the applicants had built a house on their land and had previously resided in it as their home before leaving Guernsey for a number of years to pursue employment abroad.

5.2.3 Is it necessary to have a proprietary interest in the home in order to qualify for protection under Article 8?

This question was considered in the case of *S v UK*, which concerned rights of succession on the death of a secure tenant. The Court of Appeal held that a lesbian partner of a secure tenant could not succeed to the tenancy of her deceased partner, under the provisions of the Housing Act 1980, because she was not a spouse or member of the deceased tenant's family. The applicant alleged that this was a violation of her rights under Article 8. The European Commission found the application to be inadmissible. In reaching this decision the European Commission observed that:

the applicant was occupying the house, of which her partner had been the tenant, without any legal title whatsoever. Contractual relations were established between the local authority and the deceased partner and that contractual agreement may or may not have permitted long-term visitors. The fact remains, however, that on the death of the partner, under the ordinary law, the applicant was no longer entitled to remain in the house, and

the local authority was entitled to possession so that the house could no longer be regarded as 'home' for the applicant within the meaning of article 8.

This part of the European Commission's decision suggests that without some proprietary, or at least contractual, right to stay in the property, an applicant will not acquire any protection of his or her 'home' under Article 8. However, the European Commission was not entirely convinced of this point and therefore went on to discuss the position should the house constitute her home for the purposes of Article 8. It conceded that:

Even if the applicant's right to respect for her home, as guaranteed by Article 8, could be regarded as having been interfered with by order of the county court for possession against her, the Commission considers that such interference was clearly in accordance with the law and was also necessary for the protection of the contractual rights of the landlord to have the property back at the end of the tenancy.

Therefore the European Commission was prepared to concede that where a person is lawfully occupying property, that person may still be able to invoke Article 8.

This was the view of Lord Cooke in the House of Lords' case, *Hunter v Canary Wharf* [1997] 2 All ER 426. The case concerned an action in nuisance arising out of the construction of the Canary Wharf tower and the Limehouse link road in the London Docklands. Some of the claimants had no proprietary interest in their homes and it was contended by the defendant that the absence of an interest in the property excluded them from bringing an action in private nuisance. The House of Lords, reversing the decision of the Court of Appeal, held that a claim in nuisance can only be brought by a person with a proprietary interest in the property affected by the alleged nuisance. Lord Cooke, however, delivered a dissenting judgment which made reference to Article 8 to support this view. Lord Cooke, having cited Article 8, observed (at pp. 458-9) that:

These provisions are aimed, in part, at protecting the home and are construed to give protection against nuisances; see *Arrondelle v UK* (aircraft noise) and *Lopez Ostra v Spain* (fumes and smells from a waste treatment plant). The protection is regarded as going beyond possession or property rights: see Harris, O'Boyle and Warbrick, Law of the ECHR (1995), p. 319 (emphasis supplied).

The citation that Lord Cooke relies upon states that:

There is no right to a home, not even a family home, but the notion of 'home' is not seen entirely as the protection of a particular category of established property right. It includes a family home but it is not restricted to it. While its core idea is one of sanctuary against intrusion by public authorities, there are further connotations to the idea of

'home', in particular, that the state will facilitate the right to live in one's home, rather than merely protect it as a possession or property right.³

The recent case of *Khatun and 180 others v UK* seems to have settled the matter unequivocally by providing an affirmative statement that a person who has no proprietary interest in his or her home can nevertheless qualify for protection under Article 8. The application to the European Commission arose following the House of Lords' decision in *Hunter v Canary Wharf Ltd* [1997] 2 All ER 426. The complaint to the European Commission was limited to the effects of the seven dust contamination, emanating from the construction works for the Limehouse link road, upon the applicants' private lives and homes. Many of the applicants had no proprietary interest in their homes, being the spouse or relative of the owner or being only a lodger, and the House of Lords' decision in *Hunter* meant that those applicants could not bring an action in private nuisance. The European Commission stated that:

in the domestic proceedings, a distinction was made between those applicants with a proprietary interest in the land and those without such an interest. For the purposes of Article 8 of the Convention, there is no such distinction. 'Home' is an autonomous concept which does not depend on classification under domestic law. Whether or not a particular habitation constitutes a 'home' which attracts the protection of Article 8(1) of the Convention will depend on the factual circumstances, namely the existence of sufficient and continuous links (see *Gillow v UK*). Even where occupation of the property is illegal, this will not necessarily prevent that occupation from being that person's 'home' within the meaning of Article 8 of the Convention (see *Buckle v UK*). The Commission considers that Article 8(1) applies to all the applicants in the present case whether they are the owners of the property or merely occupiers living on the property, for example the children of the owner of the property.

This raises the question of squatters and whether or not such persons can be considered to be occupying a 'home' for the purposes of Article 8. That squatters may be in unlawful occupation of a house is not fatal to their assertion that the property is their 'home' given the decision of the European Court in *Buckle v UK*. But surely a squatter, unlawfully occupying residential property belonging to another, cannot rely upon Article 8 to protect that home from repossession by the lawful owner? Although the squatter may be able to establish the applicability of Article 8, the landowner's interference with the squatter's 'home', by virtue of the acquisition of a court order to evict the squatter, will undoubtedly be justifiable under Article 8(2), being in accordance with the law and necessary in a democratic society in pursuit of the protection of the rights of others, i.e. landowners. Therefore assessing the threshold of what constitutes a 'home' for the

³ Harris, O'Boyle and Warbrick (n. 2 above) p. 319 (emphasis supplied).

purposes of Article 8 may be a futile activity. A broad interpretation of 'home' permits all occupiers, whether lawful or not, to jump the initial hurdle by satisfying the criterion of 'home', but some, including squatters, will fall at the later hurdles of legitimate aim and necessity.

8.1.4 The extension of 'home' to include some business premises

The case of *Niemietz v Germany* (1992) 16 EHRR 97 concerned a police search of a lawyer's office. The state contended that Article 8 drew a distinction between home and business premises and there was no protection against state interference with a lawyer's office. The European Court stated (at para. 30) that:

As regards the word 'home', appearing in the English text of Article 8, the European Court observes that in certain Contracting states, notably Germany, it has been accepted as extending to business premises. Such an interpretation is, moreover, fully consonant with the French text, since the word 'domicile' has a broader connotation than the word 'home' and may extend, for example, to a professional person's office.

The European Court recognised that some activities relating to a person's private life are carried on in an office or business premises, just as business activities may be conducted from a person's home. Therefore it is not always possible to draw a precise distinction between the two. Given that a state can still interfere with premises to the extent permitted by Article 8(2), the European Court felt that a state would not be unduly hampered by an extension of the term 'home' to include a professional person's offices. Moreover the European Court was prepared to recognise that the scope of permitted interferences may be more extensive where professional premises are involved. On this basis the European Court was satisfied that the search of the lawyer's office constituted an interference with his private life and home.

8.2.5 The meaning of 'private life'

Many of the cases involving an alleged interference with a person's right to respect for their home have examined, and in some cases been decided under, the broader concept of 'private life' (see *Lopez Ostra v Spain* and *Guerra and others v Italy* in Appendix 3). The notion of 'private life' includes the idea of an 'inner circle' in which individuals may live their personal lives as they so choose without interference from the state. However the European Court has held that:

it would be too restrictive to limit the notion to an 'inner circle' ... and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with human beings (*Niemietz v Germany* (1992) 16 EHRR 97 at para. 29).

In *Botta v Italy* (1998) 26 EHRR 241 the applicant complained of an impairment of his private life and the development of his personality resulting from the state's failure to take appropriate steps to remedy the lack of disabled facilities at privately owned beaches. The European Court confirmed (at para. 32) that:

Private life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings.

However, on the facts, there was found to be no breach of Article 8 (see 5.2.1). The case of *Lopez Ostra v Spain* illustrates the broad scope of the notion of 'private life' and its application to property law. In this case the European Court was satisfied that severe environmental pollution could impact upon an individual's well-being in such a way as to affect his or her private life (see 8.8).

5.3 ARTICLE 8(2): INTERFERENCE BY A PUBLIC AUTHORITY

(See the case summaries in Appendix 3 for the following cases: *Howard v UK*; *Gillow v UK*; *Powell and Rayner v UK*; *Lopez Ostra v Spain*; *Buckley v UK*; *Guerra and others v Italy*; *Khatun and 180 others v UK*; *McLeod v UK*.)

5.3.1 Interference by a public authority

Article 8(2) provides that there can be no interference by a public authority with the rights protected by Article 8(1), except such as is in accordance with the law and is necessary in a democratic society. An applicant, alleging a violation of Article 8, needs to show, first, that there has been an interference and, secondly, that the interference was by a public authority.

5.3.1.1 Establishing an interference

An interference can be due to either an act of a public authority or its failure to act. Establishing an interference will depend on the facts of each individual case, but examples from the decisions of the Strasbourg institutions include the following.

- (a) A local authority issuing a compulsory purchase order in respect of the applicants' home (*Howard v UK*).
- (b) A refusal to grant retrospective planning permission for caravans in which the applicant lived and the issuance of an enforcement notice requiring the caravans to be removed (*Buckley v UK*).
- (c) A refusal to grant a residence licence to permit the applicants to stay in Guernsey to live in their home (*Gillow v UK*).

- (d) Intense and persistent aircraft noise. The European Commission has stated that: 'Considerable noise nuisance can undoubtedly affect the physical well-being of a person and thus interfere with his private life. It may also deprive a person of the possibility of enjoying the amenities of his home' (*Powell and Rayner v UK*).
- (e) Severe dust contamination to the home (*Khatun and 180 others v UK*).
- (f) Severe environmental pollution (*Lopez Ostra v Spain*). The European Court has acknowledged that: 'severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely' (*Guerra and others v Italy*, at para. 60).

In most of the cases involving environmental pollution, the applicants were not complaining of an interference by an act of a public authority, but rather that the state had failed to act. Clearly a state can only be responsible for a failure to act where it has a corresponding duty to act. This is thus inextricably linked to the scope of the positive obligations imposed upon the states under the concept of 'respect'. In *Guerra and others v Italy*, the 40 applicants lived in a town one kilometre away from a chemical factory. The factory, which produced fertilisers and caprolactam, was classified as 'high risk'. In the course of its production cycle the factory released large quantities of inflammable gas and other toxic substances. Due to the geographical location of the factory, emissions into the atmosphere were often channelled towards the town where the applicants lived. The applicants alleged that there had been a violation of their rights under Article 8. The European Court rejected the state's argument that it was not responsible for the pollution. Emphasising the state's positive obligations under Article 8, the European Court stated (at para. 58) that:

Italy cannot be said to have 'interfered' with the applicants' private or family life; they complained not of an act by the State but of its failure to act. However, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference; in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life.

On the facts the European Court found that there was an infringement of Article 8 due to the fact that the national authorities had failed to take the necessary steps to ensure the effective protection of the applicants' rights guaranteed by Article 8.

5.3.1.2 By a public authority

It is not necessary that the state or the public authority directly undertakes the act that is the cause of the interference. For example, in *Arrondelle v UK* (1982) 5

EHRR 118 the applicant alleged that excessive noise caused by air traffic at Gatwick Airport and road traffic on the M23 motorway violated her rights under Article 8. The state submitted that it could not be held responsible for the noise generated by vehicles on the M23 motorway. However, the European Commission found that the relevant factor was the geographical position of the motorway, which had been built and operated by public authorities, and since the state was responsible for the planning and construction of the motorway at that location it was responsible for any noise pollution. In an earlier case, concerning aircraft noise from Heathrow Airport, the European Commission had noted that Article 8

cannot be interpreted so as to apply only with regard to direct measures taken by the authorities against the privacy and/or home of an individual. It may also cover indirect intrusions which are unavoidable consequences of measures not at all directed against private individuals (*Baggs v UK* (App. No. 9310/81)).

The location of the motorway and airport in *Arrondelle* amounted to an indirect intrusion for which the state was responsible.

In *Lopez Ostra v Spain*, where the apparent link between the source of the interference and the state was more tenuous, the European Court nevertheless held the state responsible. The applicant lived near a town with a heavy concentration of leather industries. A tannery waste treatment plant was built by a limited company with a state subsidy and on municipal land only 12 metres away from the applicant's home. The waste treatment plant began to operate without a licence from the municipal authorities. Owing to a malfunction the plant released gas fumes and smells into the atmosphere which immediately caused health problems and nuisance to local residents including the applicant. The Spanish authorities were not directly responsible for the fumes and smells because the waste treatment plant was built and owned by a private company; however, the plant was built on municipal land and the state had subsidised its construction. This in itself may have been sufficient to establish the necessary link between the interference and the state, but in any event the European Commission noted (at para. 55) that, regardless of the level of responsibility, direct or indirect, imputable to the state authorities, 'the Convention contains articles which not only protect the individual against the actions of third parties'. The European Commission relied on the positive obligations under Article 8(1) to find that the Government had omitted to take the necessary measures to ensure the practical and effective protection of the rights under Article 8(1).

5.3.2 Is the interference in accordance with the law?

This relates to the lawfulness of the action by the public authority. There must be a specific, accessible legal rule (whether by statute, delegated legislation or part

of the common law) which authorises the act that causes the interference and lets the individual know the basis for the interference with his property. For example, in *Huckle v UK*, the town and country planning regime authorised the local planning authority's refusal to grant the applicant planning permission. This legislation was accessible to the applicant and the local authority's action was consequently foreseeable. Similarly, in *Howard v UK*, the European Commission was satisfied that the interference with the applicant's home, as a result of a compulsory purchase order being issued by the local authority, was in accordance with the law as the order was made under statutory provisions that were both readily accessible and foreseeable.

In the case of *Sunday Times v UK* (1979) 2 EHRR 245, which concerned an alleged breach of the applicant's right to freedom of expression under Article 10, the European Court identified accessibility and foreseeability as the appropriate criteria for establishing the lawfulness of an interference. The European Court stressed the need for states to avoid arbitrariness in implementing their legal rules and stated (at para. 49) that:

Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct'.

Therefore not only must a person have adequate access to the law in question, but that law must be sufficiently clear and precise to enable the person to foresee the circumstances in which the law will, or may, be applied.

5.3.2.1 Foreseeable

In *Gilllow v UK*, the applicants' applications for residence licences to permit them to live in their home in Guernsey were refused by the housing authority. They complained that the relevant legislation gave the housing authority such wide discretionary powers that its decisions were unforeseeable and unpredictable. However, the European Court was satisfied that the interference was in accordance with the law. The European Court observed (at para. 51) that:

A law which confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.

The question of foreseeability also arose in the case of *McLeod v UK*, where the applicant maintained that the common law power of the police to enter private property without a warrant on the grounds of preventing an anticipated breach of

the peace was not 'in accordance with the law'. The European Court stressed (at para. 41) the need for the measure to be formulated with sufficient precision to enable a person concerned:

to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. However, those consequences need not be foreseeable with absolute certainty, since such certainty might give rise to excessive rigidity, and the law must be able to keep pace with changing circumstances.

On this basis the European Court was satisfied that the common law power was in accordance with the law.

5.3.2.2 Accessible

To be accessible the rule must be available to an applicant either by access to the relevant text and/or through the availability of legal advice. In *Malone v UK* (1984) 7 EHRR 14, the police had tapped the applicant's telephone. The European Court found that the interference violated Article 8 because it was not prescribed by law. At the time the only regulation of telephone tapping was by means of an internal police code of practice that was not available to the public. The applicant could not therefore determine whether any surveillance might occur and why. A similar approach was taken by the European Court in the more recent decision of *Halford v UK* (1997) 24 EHRR 523 where the police interception of telephone calls made from the applicant's office violated Article 8 because it was not 'in accordance with the law'.

5.3.3 Is there a legitimate aim to justify the interference?

The need for a legitimate aim relates to the state's justification and reasons for the interference with the applicant's rights under Article 8(1) (see 2.4). Article 8(2) provides the following list of legitimate aims:

- (a) national security;
- (b) public safety;
- (c) economic well-being of the country;
- (d) prevention of disorder or crime;
- (e) protection of health or morals;
- (f) protection of rights and freedoms of others.

As the scope of these aims is extremely wide, it is relatively easy for the state to establish the existence of a legitimate aim to justify its actions. It is common for the state to raise more than one aim to justify the measure and the European Court need only be satisfied in respect of one of the cited aims. Examples from the case law of the Strasbourg institutions include the following.

- (i) In *Buckley v UK* the refusal to grant the applicant retrospective planning permission for her caravans was based on a town and country planning policy aimed at furthering highway safety, the preservation of the environment and public health. Therefore the interference with the applicant's home was found to pursue the legitimate aims of public safety, the economic well-being of the country and the protection of the health and rights of others.
- (ii) In *Howard v UK* the European Commission concluded that the state interference with the applicants' home, as a result of the implementation of a compulsory purchase order against it, pursued the legitimate aim of 'the protection of the rights and freedoms of others' because the applicants' land, once compulsorily acquired, would be part of a redevelopment scheme of the deprived inner city area and would thereby benefit others.
- (iii) In *McLeod v UK*, the European Court acknowledged that the police power to enter into and remain on private premises without permission, in order to prevent the occurrence of a breach of the peace, was in pursuit of a legitimate aim, namely the prevention of disorder or crime.

5.3.3.1 The economic well-being of the country

The 'economic well-being of the country' has a wide scope and is regularly cited by the states as a justification for state interference. For example, in *Gillow v UK*, the European Commission accepted the state's assertion that the controlled market in houses and the residence licensing system, which prevented the applicants from being able to live in their home, was implemented to maintain a balance between the requirements of the existing population, horticultural and other economic interests, the interests of persons wanting to move to Guernsey to live and the interests of the tourist industry. This clearly pursued the legitimate aim of the economic well-being of the country and the European Court endorsed this view in its judgment. In *Lopez Ostra v Spain*, the construction of a tannery waste treatment plant, which subsequently caused severe environmental pollution, was justified because the town had a heavy concentration of leather industries and therefore the construction of the plant was found to be for the economic well-being of the town. Similarly, in *Khatun and 180 others v UK*, the construction of the Limehouse link road, which generated considerable dust affecting the applicants' homes, gave access to the Docklands from Central London and was seen as essential for the regeneration of the derelict urban areas in the Docklands. The European Commission was satisfied that the measures pursued the legitimate aim of the economic well-being of the country. Also in *Howell and Rayner v UK*, which concerned noise pollution caused by aircraft, the applicants themselves conceded that the operation of Heathrow Airport, occupying an important position in relation to international trade, communications and

the economy of the UK, pursued a legitimate aim as being for the economic well-being of the country. Although there are plenty of examples of when an interference is found to be in pursuit of the economic well-being of the country, there is no clear guidance as to what kind of test the European Court is applying and what kind of evidence is required to demonstrate the economic advantages flowing, perhaps indirectly, from the interference.

5.3.4 Is the interference necessary in a democratic society?

Having established the existence of a legitimate aim, it must then be ascertained whether the measures employed to implement that aim are 'necessary in a democratic society'. As a starting point the European Court has recognised that

It is for the national authorities to make the initial assessment of the 'necessity' for an interference, as regards both the legislative framework and the particular measure of implementation. Although a margin of appreciation is thereby left to the national authorities, their decision remains subject to review by the Court for conformity with the requirements of the Convention (*Buckley v UK*, at para. 74).

The concept of necessity embraces two related issues. First, the existence of a 'pressing social need' and secondly, the principle of proportionality. The European Court has confirmed that this is its recognised approach to the question of necessity in Article 8(2). It has stated that: 'According to the Court's established case-law, the notion of necessity implies that an interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued' (*Olsson v Sweden* (1988) 11 EHRR 259 at para. 67).

5.3.4.1 A pressing social need

The European Commission has explained this requirement in the following terms:

As the Convention organs have repeatedly recognised, to satisfy the requirement of necessity referred to in Art. 8(2) of the Convention, it must be established that the measure in question was not merely desirable or convenient, but responded to a real requirement (*Gillow v UK*, at para. 132).

This real requirement is often referred to as a 'pressing social need'. In making the initial assessment of the reality of a pressing social need the states enjoy a wide margin of appreciation. The European Court has recognised that national public authorities are in a better position to assess the necessity of a measure than an international judge. It is inevitable that the existence of a pressing social need will be closely linked to the legitimate aim, but it is not necessarily the case that establishing a legitimate aim will automatically lead to satisfying the requirement

for a pressing social need. For example, in *Howard v UK*, the applicants, two brothers, were the owners and occupiers of Rose Cottage and the surrounding land where they had lived for over 50 years. The local authority issued a compulsory purchase order in respect of the applicants' land and it intended to demolish Rose Cottage, which was unsightly having a high corrugated iron fence and heaps of scrap, in order to make land available for the construction of new houses. This action was part of a scheme to redevelop the area which was a run-down, inner-city area in need of improvement. The European Commission accepted that there was a pressing social need for the compulsory purchase order which was necessary to pursue the legitimate aim of protecting the rights and freedoms of others. However, the position would have been different if Rose Cottage had been situated in a pleasant residential area that did not need to be redeveloped. In such a case the state could still try to contend that a legitimate aim existed; for example it could argue that the proposed redevelopment, by providing jobs, would be for the economic well-being of the town or that it protected the rights of neighbours whose property was adversely affected by the unsightly Rose Cottage (such arguments are somewhat tenuous and would be subject to debate). However, the state would have difficulty in showing that a pressing social need existed if there was no real requirement for the land to be redeveloped in the first place.

There is an inevitable link between the requirement of a pressing social need and the principle of proportionality. The European Commission drew attention to this nexus in its opinion in *Gillow v UK*. The reasons given to the applicants for the refusal of a residence licence relied principally upon the 'adverse housing situation' which the Government perceived as existing in Guernsey. The European Commission decided (at para. 137) that it must, 'examine the degree to which the refusal of the applicants' licence requests reflected a 'pressing social need' by reference to the question whether or not these refusals were proportionate to the aim which the licensing legislation pursued'.

5.3.4.2 Proportionality

In *Buckley v UK* the European Court had to assess whether the applicant suffered a disproportionate burden due to the refusal to grant her retrospective planning permission to allow her to continue living in the caravans parked on her land. In the sphere of town and country planning, the states are allowed a wide margin of appreciation. The European Court acknowledged (at para. 75) that:

By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. In so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation.

Town and country planning schemes inevitably involve the exercise of discretionary powers by the public authorities acting in the interests of the whole community. There may be scope for differences of judgment in the use of the discretion, but the European Court stressed that it would not substitute its own view of what would be the best policy in the planning sphere. In *Buckley*, the European Court was satisfied that the public authorities had given due regard to the interests of the applicant. They had taken her special needs as a gypsy, following a traditional lifestyle, into account and had had regard to the shortage of gypsy caravan sites in the area. However, they had concluded that the general interest of the public in conforming to the planning policy, which was to promote open countryside and to prevent all but essential development, outweighed the applicant's needs. The European Court also had regard to the fact that she had declined an invitation to apply for a pitch on an official caravan site because she felt that it was unsuitable. The European Court observed (at para. 81) that: 'Article 8 does not necessarily go so far as to allow individuals' preferences as to their place of residence to override the general interest'. Taking into account all of the above considerations, the European Court concluded (at para. 84) that:

proper regard was had to the applicant's predicament both under the terms of the regulatory framework, which contained adequate procedural safeguards protecting her interest under Article 8, and by the responsible planning authorities when exercising their discretion in relation to the particular circumstances of her case. The latter authorities arrived at the contested decision after weighing in the balance the various competing interests at issue.

There was consequently no violation of Article 8.

Howard v UK involved an interference with the applicants' right to respect for their home by virtue of a compulsory purchase order. The European Commission was satisfied that a fair balance had been struck between the applicants' interests and the interests of the community as a whole. There were a number of relevant factors in reaching this decision including the fact that if the applicants' land, which was low lying and level land, were excluded from the redevelopment scheme it would be impossible to include sheltered housing for the elderly. This factor was weighed in the balance together with the fact that the applicants had been offered alternative residential accommodation in the immediate vicinity of their home and they were entitled to full compensation for the value of their land, in addition to compensation for disturbance and removal expenses. The European Commission concluded that the interference was justified as necessary in a democratic society for the protection of the rights and freedoms of others who would benefit from the proposed redevelopment.

In assessing the fair balance test in *Khatun and 180 others v UK*, the European Commission noted that the construction of the Limehouse link road was essential

to the development of the London Docklands. Against this important public interest it weighed the considerable degree of inconvenience caused to the applicants by the dust produced during the construction of the road. The European Commission noted that, 'the inconvenience, whilst undoubtedly unpleasant, has not been claimed to have given rise to health problems for any of the applicants. Further, it was limited in time to the period of the works, some three-and-a-half years'. Taking these two factors into account and, bearing in mind the importance of the public interest, the European Commission concluded that a fair balance had been struck between the competing interests of the individual and of the community.

These cases illustrate the European Court's application of the fair balance test in weighing up the various competing interests to ascertain proportionality and thereby to ensure that the individual concerned does not suffer a disproportionate burden. In each case the Strasbourg institutions were satisfied that the interference was proportionate to the legitimate aim to be achieved.

However, *Gillow v UK* and *McLeod v UK* are examples of cases in which the state was found to be in breach of Article 8 due to a lack of proportionality between the legitimate aim pursued and the interference with the applicants' right to the respect of their home.

In *Gillow v UK* the applicants, who were husband and wife, moved to Guernsey in 1956 and having brought a plot of land, built a house called 'Whiteknights'. Due to work commitments they left Guernsey to work abroad and 'Whiteknights' was let to tenants. Under the legislation in force at that time the applicants had no resident qualifications which enabled them to occupy 'Whiteknights' without a licence. However, in 1970 legislation was introduced which imposed a residency requirement with the effect that the applicants were no longer entitled to occupy 'Whiteknights' without a residence licence. They later returned to Guernsey to apply for a licence to occupy 'Whiteknights' as their retirement home, or for a period sufficient to put the property into repair for the purposes of sale or letting. The licences were refused in the light of the adverse housing situation in Guernsey and Mr Gillow was subsequently prosecuted for the unlawful occupation of his house and was fined. In assessing the proportionality of the interference, the European Commission observed (at para. 141) that: 'In view of the protection given by Art. 8, the prohibition of the enjoyment of a property built and owned by an individual as his home can only be justified in the most exceptional circumstances'. The European Court took note of the fact that the applicants had initially built 'Whiteknights' and had let the house during their 18 years of absence from the Island. In this respect they had significantly contributed to the housing stock of Guernsey. It concluded (at para. 58) that:

the decisions by the Housing Authority to refuse the applicants permanent and temporary licences to occupy Whiteknights, as well as the conviction and fining of Mr.

Gillow, constituted interferences with the exercise of their right to respect for their home which were disproportionate to the legitimate aim pursued'.

Therefore the interference with the applicants' right to respect for their home was not necessary in a democratic society and was consequently in violation of Article 8.

In *McLeod v UK*, the applicant's ex-husband entered her home, during her absence, in order to remove furniture that belonged to him. His solicitors had arranged for two police officers to be present while the property was being removed on the grounds that a breach of the peace might occur. The European Court accepted that the police had the power to enter private property without the owner's permission in order to prevent a breach of the peace. However, on the particular facts, the European Court decided that the action of the police, though justified, had been disproportionate because it did not strike a fair balance between the applicant's right to respect for her home and the public interest in the prevention of disorder and crime. The European Court considered that the police should have taken steps to verify the terms of the court order to ensure that the ex-husband was entitled to enter the home. Had they done so they would have discovered that he was not so entitled. In addition, the fact that the applicant was not present at the time of the removal of the furniture was a relevant factor since her absence meant that there was little or no risk of a breach of the peace occurring and consequently the police should not have entered her house. Therefore the police measures were found to be disproportionate to the legitimate aim and a breach of Article 8 ensued.

It is interesting to observe that in the judicial review case, *R v North and East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR 622, the Court of Appeal found the health authority to be in breach of Article 8. The applicant, who was severely disabled, was moved, with her consent, from a hospital to a National Health Service facility (Mardon House) for the long-term disabled. At the time, the health authority assured her that this would be her home for the rest of her life. Five years later the health authority decided to close down Mardon House. On an application for judicial review of the closure decision, the judge quashed the health authority's decision and the Court of Appeal dismissed the appeal by the health authority. Although the HRA 1998 was not in force at the time of the judgment, the Court of Appeal nevertheless had regard to the Article 8 considerations. It acknowledged that the public cost to be saved by the closure of Mardon House was not dramatic and it weighed this against the fact that the enforced move would be 'emotionally devastating and seriously anti-therapeutic' for the applicant. The Court of Appeal decided that the measure could not be justified by Article 8(2) without providing alternative accommodation which equally met the special needs of the applicant. On the facts, no such alternative accommodation had been offered and, consequently, the Court of Appeal found the health authority's conduct to be in breach of Article 8.

5.3.4.3 Proportionality and due process

In the assessment of proportionality under Article 8, a factor of particular significance is the procedural safeguards available to the individual. The European Court has stated that:

Indeed it is settled case law that, whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 (*Buckley v UK*, at para. 76).

In *Buckley* the European Court was satisfied that the town and country planning regime contained adequate procedural safeguards to protect the applicant's interest. The appeal procedure to the Secretary of state involved an assessment by a qualified expert to whom the applicant could make representations and, in addition, the applicant could apply for judicial review by the High Court of the public authority's exercise of its discretionary powers.

The case of *Niemietz v Germany* (1992) 16 EHRR 97 further illustrates the importance of the due process considerations in assessing the fair balance test under Article 8. In this case the interference was held to constitute a breach of Article 8 because it was disproportionate to the aim to be achieved. One of the factors in reaching that conclusion was the absence of any special procedural safeguards, e.g. an independent observer, accompanying the police search of the lawyer's office.

5.3.4.4 Proportionality and compensation

The relevancy of compensation, as a factor to be weighed in the fair balance test, depends upon the nature of the interference complained of. In *Powell and Rayner v UK* the absence of compensation in respect of aircraft noise from Heathrow Airport did not prevent the European Commission from declaring the application under Article 8 to be inadmissible. However, compensation was a particularly relevant factor in assessing proportionality in *Howard v UK*, where the interference involved the expropriation of the applicants' home by means of a compulsory purchase order.

5.4 THE RELATIONSHIP BETWEEN THE IMPOSITION OF POSITIVE OBLIGATIONS UNDER ARTICLE 8(1) AND THE REQUIREMENTS OF ARTICLE 8(2)

In *Powell and Rayner v UK*, which concerned noise pollution caused by aircraft, the European Court avoided deciding whether the case involved positive obligations on the state under Article 8(1) or negative obligations under Article 8(2). The European Court said that in both cases the applicable principles are

3 PORTFOLIO COMPONENT 2 – Understanding my research methods and methodology

3.1 Introduction

The purpose of this component of my portfolio is to explain the research design and processes adopted to answer my research questions. I will explain and justify my decisions on the methodological approach adopted to generating and analysing data. Integral to this explanation is an appreciation of how I come to understand the world and how I come to know it (my ontology and epistemology respectively). As will become apparent, I believe my worldview shapes my methods of data generation and data analysis and it is important to acknowledge the role my values, underlying assumptions and inherent biases play in this.

3.2 The story of my DLaw research journey

Throughout the first year of my DLaw, I researched the topic of pet custody disputes with a proposed title '*The Social Construction of dogs and cats as pets and the implications for resolving pet custody disputes in England and Wales*'. Disputes over who gets to keep the family pet following the breakdown of a relationship are gaining prominence, yet there is practically no research in England on the topic, nor does it feature in family law student textbooks (for example, Herring, 2019) or CPD training for family law practitioners. Clearly, I had identified a significant knowledge gap. In 2014, before I started my DLaw, I published an article on pet custody disputes having become interested in the subject when lecturing on the legal status of domestic animals for my animal law module on the undergraduate law degree. Some of the pet custody cases in the USA and Israel challenge the legal status of companion animals as pure property (*Ploni v Plonit* (2004) *Ramat Gan Family Court. FC 32405/01*; *Houseman v Dare* (2009) 966 A.2d 24, *N.J.Super.Ct.App.Div.*) and I read a number of articles on the subject (for example, Britton, 2006; Stroh, 2007; Lerner, 2010). This led to me writing an article '*Who gets Charlie? The emergence of pet custody disputes in family law: adapting theoretical tools from Child Law*' (Rook, 2014) in the *International Journal of Law, Policy and Family*. My article aroused media interest including *The Independent* newspaper (Swinburne, 2014; Carter, 2016) and the Royal College of Veterinary Surgeons online magazine (MRCVS).

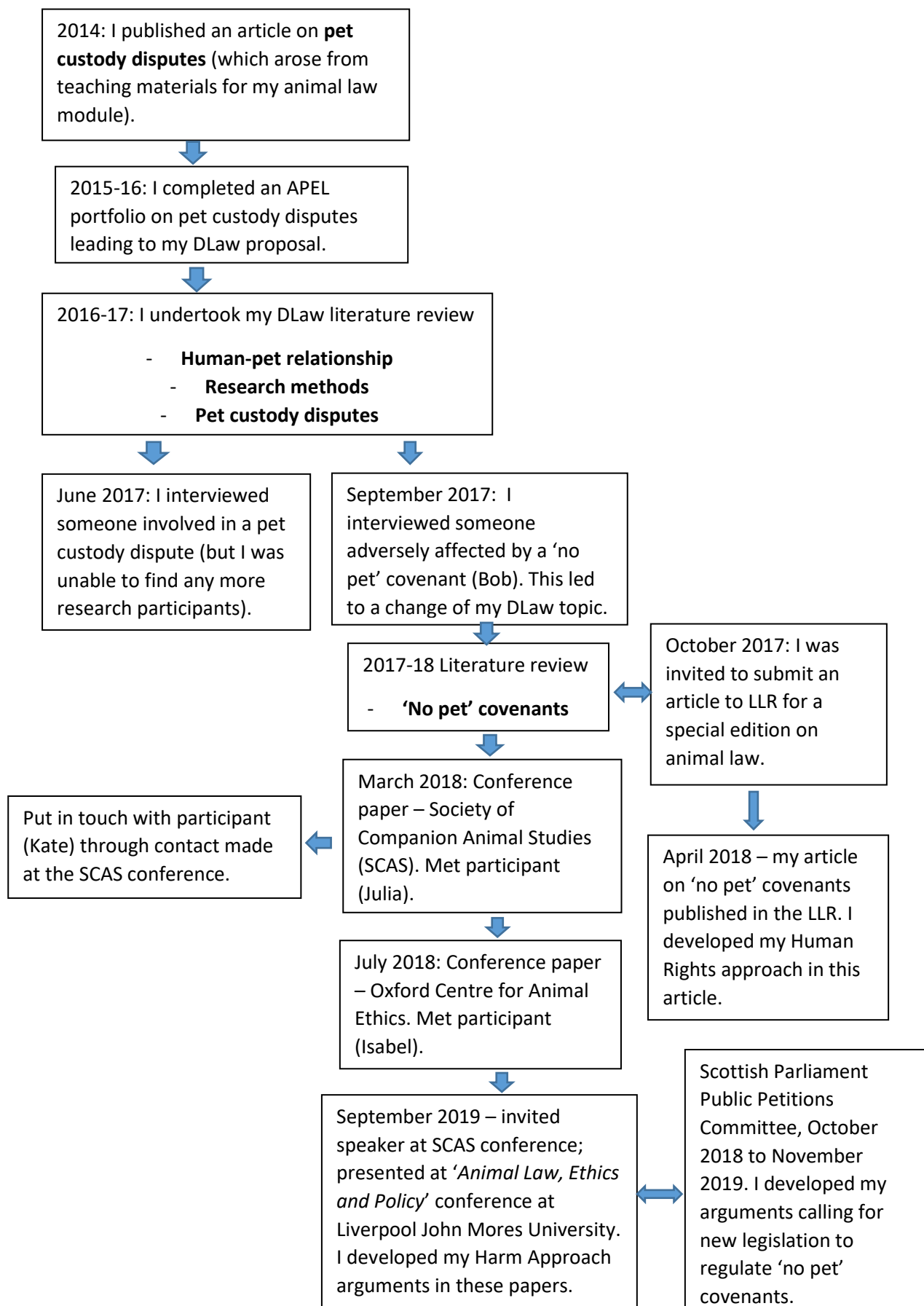
Given the lack of research on the topic especially in legal journals, I decided it would be an excellent subject for my DLaw. I spent my first year of the DLaw doing my literature review focussing on two areas: the human-companion animal relationship and pet custody disputes. In July 2017, I interviewed my first participant after she contacted me via my University email

having read about my article in a Northumbria University press release. She had been involved in a pet custody dispute and was keen to tell me about her experience. Over the summer of 2017, I tried in vain to find other research participants. I used social media, joined a number of pet forums (for example Petforum.co.uk and dogforum.co.uk and pet-owners.org) where I posted invitations for participants, contacted solicitors who were reported in the media as having been involved in pet custody disputes and contacted solicitors who advertised pet custody on their websites. Unfortunately, my efforts were unsuccessful. It felt like I had hit a brick wall.

A few months before this I had become involved in a social media campaign on change.org for an 87-year old man, Mr Bob Harvey, who had been told to give up his dog, Darkie, for rehoming or face eviction from the care home where he lived. I had already decided to interview Bob with a view to doing post-doctoral research on the topic of 'no pet' covenants in residential leases. Having got ethics approval I interviewed him in September 2017 and within a few months I had decided to change the focus of my DLaw research to the issue of 'no pet' covenants. I still had no participants for pet custody disputes and I felt that it would be much easier to find pet-owning tenants willing to talk about their experience of 'no pet' covenants. I could still use much of the literature review I had completed for the human-companion animal relationship as well as my work on research methodology and I had the advantage of having taught land law for 20 years. At this time, I took advantage of an opportunity to contribute an article to a special Animal Law edition of a law journal having presented a paper on my animal law module at the first Animal Law, Ethics and Legal Education conference at Liverpool John Moores University in September 2017 where I met the editor. I decided to submit an article on 'no pet' covenants using Bob and Darkie as a case study. Due to the tight deadline for writing the article, I wrote it before doing any more interviews. My article '*For the Love of Darcie: recognising the human-companion animal relationship in housing law and policy*' (Rook, 2018) was published in April 2018. In March 2018, I was an invited speaker at the Society of Companion Animal Studies (SCAS) conference in Cambridgeshire and I presented a paper at the Oxford Centre for Animal Ethics summer school in July 2018. Both of these conferences led to the recruitment of research participants and I conducted five interviews over the summer of 2018. That summer, my article was cited in a petition to the Scottish Parliament calling for legislation to prohibit the use of 'no pet' covenants in residential leases. I subsequently became involved in the campaign, twice attending the committee meetings to observe their deliberations and helping the respondent to draft her responses to the committee (see Appendix 1 for the Parliamentary briefing paper citing my article). It is clear to me that my involvement in the Scottish Parliament petition influenced the direction of my DLaw at that time. I extensively

debated the arguments for and against legislation to regulate the use of 'no pet' covenants and became convinced of the need for legislation. At this time, I was on a research sabbatical and was undertaking data analysis of my interviews and a key theme to emerge from the data was harm. I spent time identifying the nature of the harm caused to the relevant parties and assessing the magnitude of the harm and its significance to the lives of those affected. As the theme of harm emerged, I reflected this in the wording of my research questions. *Figure 4* shows how my research evolved and developed over time and the external influences on this progression.

Figure 4 - How my DLaw evolved and developed over time in response to external influences



3.3 My research aim and questions

There is an intrinsic link between the research aim/questions and the research design and therefore I start the methodology component of the portfolio by re-stating my research aim and research questions.

The overarching aim of my research is to fill a significant gap in the legal literature by

- understanding the lived experience of 'no pet' covenants for pet-owning tenants in residential leases in the UK and
- critically analyse the current law around 'no pet' covenants in England with a view to evaluating any need for changes in housing law, policy and practice.

The research questions to achieve my aim are as follows:

1. How do people in the UK construct companion animals as family members in everyday practices?
2. What do the stories of pet-owning tenants in the UK reveal about their lived experience of 'no pet' covenants?
3. How can the insights from these stories develop and enhance a deeper understanding of the harm 'no pet' covenants cause to tenants and companion animals? (Knowledge that can be used by those involved in residential lettings - landlords, letting agents, lawyers, courts).
4. If tenants perceive their cats and dogs as family members, can the human-companion animal relationship come within 'private life and family' under Article 8, European Convention on Human Rights?
5. In what ways, if any, does the existing law in England recognise and protect the human-companion animal relationship in the context of 'no pet' covenants in residential leases?
6. Is there a need for change in housing law, policy and practice to regulate the use of 'no pet' covenants in residential leases in England?

To address questions 1-3 I undertook a literature review on the nature of the human-companion animal relationship and the use of 'no pet' covenants as well as my own empirical research interviewing pet-owning tenants. I was then able to use the insights I acquired from the literature review and interview data analysis to address questions 4-6, which have implications for housing law in England. Answering questions 4 and 5 involved black letter law research – firstly, a critical analysis of the law relating to Article 8, European Convention on Human Rights to assess whether the human-companion animal relationship falls within family and/or private life. If it does, this would have significant implications for the

use of 'no pet' covenants by public authority landlords. Secondly, a critical analysis of the law in England on repossession by public landlords following a tenant's breach of a 'no pet' covenant. My black letter law analysis of the existing law in order to answer questions 4 and 5 led to an assessment of its adequacy. This was addressed in question 6 together with a consideration of the need for change in housing law, policy and practice to regulate the use of 'no pet' covenants. My findings can be used by housing practitioners to advise their clients (whether landlord or tenant) and therefore has practical use in the field.

3.4 My literature review

My literature review evaluates the current state of academic knowledge on 'no pet' covenants enabling me to identify the key contributions, identify gaps in the knowledge and demonstrate how my own research contributes to the literature. It allows me to corroborate and defend my knowledge claim that there is a distinct lack of research on 'no pet' covenants especially qualitative research that seeks to understand a tenant's lived experience of 'no pet' covenants. Little is known about the effect of 'no pet' covenants on tenants and in the UK there is no empirical research in the existing literature. I carried out searches on electronic legal databases using selected key words such as '(pet w/2 covenant*)' and also '(no w/2 pet*)' and covenant* and lease* or leasehold' and also '(no w/2 dog* or cat*) and lease* or leasehold' in Heinonline. I know from experience as an animal law lecturer that Heinonline is a more useful database for animal law articles than Westlaw or LexisNexis, although I did searches on these databases too. I did not use any restrictions on year of publication or jurisdiction because so few articles have been published on 'no pet' covenants that I did not want to impose any restrictions. I found the snowballing effect of using references cited in articles very useful. I was confident I had a complete list when I kept finding references to the same articles, especially when the recently published articles from Graham *et al* (2018) and Fox and Ray (2019) revealed no new academic articles that I did not already have.

Table 1 lists the academic articles I found on 'no pet' covenants. These are grouped into three categories: empirical research; scholarly research that relies on existing literature and finally research published by students. I have listed those articles published by students separately as these are less authoritative. The table lists the country where the research took place (as this becomes relevant when the law is considered). The scholarly discipline of the researcher is also shown as this inevitably influences the focus of the research.

Table 1 - Academic articles (published in English) on ‘no pet’ covenants from my literature review

Year	Reference	Country where research took place	Discipline of researcher	Research method	Focus of research
	EMPIRICAL RESEARCH				
1988	Mahalski, P.A., Jones, R. and Maxwell, G.M. ‘The value of cat ownership to elderly women living alone’. <i>The International Journal of Aging and Human Development</i> , 27(4), pp. 249-260.	New Zealand	Psychology	Empirical research on ‘no pet’ covenants: Survey of elderly women in public sector housing in two cities one of which allowed cats and the other prohibited cats in housing.	Focuses on positive attitudes in the elderly comparing those living with pet cats to those prohibited from having cats due to ‘no pet’ housing policy.
2005	Carlisle-Frank, P., Frank, J. M. and Nielsen, L. ‘Companion animal renters and pet-friendly housing in the US’ <i>Anthrozoos</i> , 18(1), pp. 59-77.	USA	Foundation for Interdisciplinary Research and Education Promoting Animal Welfare	Empirical research on ‘no pet’ covenants: Surveyed 120 tenants and 102 landlords randomly selected from 14 cities across the USA.	Focuses on statistical data on the factors influencing the availability of pet-friendly property in the USA.
2017	Power, E. ‘Renting with pets; a pathway to housing insecurity’ <i>Housing Studies</i> , 32(3), pp. 336-360.	Australia	Geography	Empirical research on ‘no pet’ covenants: Publically available survey and 28 in-depth interviews with pet-owning tenants.	Focuses on rental insecurity especially the difficulty of finding pet-friendly property.
2018	Graham <i>et al.</i> “‘Pets Negotiable” How do the perspectives of landlords and property managers compare with those of younger tenants with dogs? <i>Animals</i> , 8(3), pp.32-44.	Canada	Community health science	Empirical research on ‘no pet’ covenants: 28 in-depth interviews with young tenants (20-30 years) with dogs and a survey with 30 landlords/ property managers who allow pets.	Focuses on the pet-owning tenant’s ‘cycle of insecurity’ in securing pet-friendly housing: Searching, Settling and Staying put.

Table 1 (continued)

Year	Reference	Country	Discipline	Research method	Focus
2018	Graham, T.M. and Rock, M.J. 'The Spillover Effect of a flood on pets and their people: Implications for rental housing' <i>Journal of Applied Animal Welfare Science</i> pp. 1-11.	Canada	Community health science	Empirical research on 'no pet' covenants: analysed online rental listings in a city that had been severely flooded.	Focuses on assessing the availability of pet-friendly rentals in the aftermath of a major disaster.
	SCHOLARLY RESEARCH				
2005	Huss, R. 'No Pets Allowed: Housing Issues and Companion Animals' <i>Animal Law</i> , 11, pp. 69-129.	USA	Law	Scholarly research	Focuses on the legal issues that arise when tenants keep pets in various types of housing in the USA.
2018	Rook, D. 'For the Love of Darcie: Recognising the Human-Companion Animal Relationship in Housing Law and Policy', <i>Liverpool Law Review</i> , 39, pp. 29-46.	UK	Law	Scholarly research	Focuses on legal challenges to the use of 'no pet' covenants in the UK and considers legislative options.
2019	Fox, M. and Ray, M. 'No pets allowed? Companion animals, older people and residential care', <i>Med Hummanit</i> , 45, pp. 211-222.	UK	Law and Health/ Social care	Scholarly research (leading to future empirical research)	Focuses on framing legal responses to the forced separation of older people from their pets when they move into a care home.

Table 1 (continued)

Year	Reference	Country	Discipline	Research method	Focus
	STUDENT RESEARCH				
2009	Campbell, H.L. 'The Reasonable Requirement Standard in Saskatchewan's Residential Tenancies Act and No Pet Clauses in the Social Housing Context' <i>Sask. L. Rev.</i> 72, pp. 257-319.	Canada	Law student	Student article	Focuses on housing law in Canada and uses 'no pet' covenants as a case study to demonstrate the unfair treatment at law of public sector tenants.
2013	Palluzi, L. 'Four-Legged Tenants: Encouraging Pet-Friendly Housing While Protecting Landlords from Liability' <i>Mid-Atlantic J. on L. & Pub. Pol'y</i> , 2, p. 101.	USA	Law student	Student article	Focuses on the legal barriers in the USA to renting with pets and the benefits to landlords of pet-friendly property.

The most useful empirical studies for my research are Power (2017) and Graham *et al* (2018), research studies from Australia and Canada respectively. Like my research, both use qualitative research methods to interview pet-owning tenants and use thematic content analysis to identify relevant themes arising from the interview data. Power's (2017) study focuses on the concept of rental insecurity and examines the way in which 'no pet' covenants impact on a tenant's sense of a secure home. I found this a very useful study and used the themes identified from the empirical research as starting points when analysing my own interview data. My research builds on this Australian study by examining whether pet-owning tenants in the UK have a similar experience of 'no pet' covenants. My research also adds new insights because it explores beyond the concept of 'rental insecurity' to understand the whole of the tenant's experience. The Graham *et al* (2018) study specifically focuses on the experience of young tenants who own dogs. The article was published after I had already started doing my interviews but I found its findings insightful at my data analysis stage. I used the themes from this research as starting points to explore their relevance to my participants. My research builds on this Canadian study by comparing the experience of pet-owning tenants in the UK with those in Canada. In addition, my research participants are not limited to young tenants with dogs so my research has a broader scope. Neither of these

studies analysed the relationship the tenant had with their companion animal but instead relied on the existing literature to show that tenants often see their pets as family members. Drawing on Michael's (2000) concept of the co(agency) my research goes further than Power and Graham *et al* because it adopts the hybrid or assemblage of human+animal+home+lease (Huanihomse) as the research subject recognizing how the constituent parts interconnect and influence each other to form a distinct whole. To examine the constituent parts in isolation may mean researchers miss something that is only apparent when the hybrid is examined.

I decided to exclude a number of articles from my literature review. Firstly, I exclude a number of articles, all from the USA and often written by students, that specifically focus on the housing needs of disabled people who live with service animals. Disabled people and their service animals have particular housing needs and share a unique relationship that differs from those tenants in my research. My participants lived with their dogs and cats as companion animals not as working animals. Disabled people with service animals also have protection under anti-discrimination law that is not available to non-disabled tenants with pets. Secondly, I excluded two articles, (Herbster, 2000; Kight, 2012) from the USA and written by law students, that examined whether a pot-bellied pig and miniature horse respectively could be deemed a pet and thereby exempt from zoning laws that prohibit farm animals living in households.

While my literature review provides valuable resources to develop my understanding of the research topic, enabling me to see where my original contribution fits within the bigger picture, it is my theoretical assumptions that steer the direction of my research and underpin the practical decisions I make about data collection and analysis. My theoretical assumptions as a social constructionist were explained in section 1.2 of the commentary and justify my reliance on qualitative research methods.

3.5 My decision to use qualitative research methods

A qualitative approach aligns with my social constructionist worldview because it seeks to explore the social world through the experiences of people, their relationships and the significance of their meanings. Qualitative research emphasises the importance of context and connects context with explanation (Mason, 2002). I believe there is no single reality that can be observed and understood separate to the people who experience it. To understand a version of reality as it exists for a particular person or group (such as pet-owning tenants), we must find the meaning that those people give to experiences and social situations (Gergen, 2015). For this reason, a qualitative research approach, using in-depth interviews, that seeks to achieve depth rather than breadth of understanding is well-suited for my

research. It provides rich, contextual and in-depth material that facilitates my understanding of meanings and interpretations.

There is no unified set of techniques for qualitative research but Mason (2002) identifies some common elements: firstly, qualitative research is grounded in an interpretivist philosophy that is concerned with how the social world is interpreted and experienced; secondly, the methods of data generation are

“flexible and sensitive to the social context in which data are produced” (Mason, 2002, p. 3);

thirdly, the methods of data analysis involve understanding complexity, detail and context. Finally, qualitative research acknowledges reflexivity – the extent to which the researcher's own thoughts, actions and decisions can shape what is seen in the data. I drew on these commonalities in designing my research method. My interviewing technique (which was mainly unstructured) allowed the participants to tell their story in their own words. My combination of thematic content analysis and narrative analysis ensured a holistic approach thereby enabling an understanding of the complexity of the issues and a recognition of the co-construction of the interview data.

Interview data provides a ‘situated accounting’,

“that is, particular versions of affairs produced by particular interlocutors on specific occasions” (Roulston, 2010, p. 61).

It is researcher-provoked data (Silverman, 2014), a result of an artificially created conversation that involves a two-way dialogue in which data is created. This data is inevitably influenced by my presence and what the person knows about me in advance of the meeting. For me, this is an important recognition and I am consciously aware of how I may be altering the data in the very process of its creation during an ‘active interview’ (Holstein and Gubrium, 1995). All but one of my interviewees (David) knew prior to our meeting that I had a particular view of pets and ‘no pet’ covenants. Julia, Lucy, Josh and Isabel knew that I had published an article challenging the use of these covenants under human rights law and Julia, Lucy and Isabel had heard me present a paper on my article. How did this prior knowledge of my views affect what they said to me in the interview? As a Social Constructionist, I believe that a person's identity is not fixed but instead people have multiple voices and present different aspects of themselves in different contexts.

Interviewees may filter out part of their experience that may show them in an undesirable light (Polkinghorne, 2007) or conversely may exaggerate events and sentiments that show them in a good light. Could their prior knowledge of my views influence how they portrayed themselves in the interview? It is possible but I never got the feeling that the interviewees

were particularly bothered about pleasing me. They were more concerned that their story was told because they felt they had experienced an injustice and had been treated unfairly. I think that their prior knowledge of my sympathies encouraged a confidence between us that allowed them to talk openly to me and thereby arguably contributes to the trustworthiness of what they told me about their relationship with their companion animal and the effect of 'no pet' covenants on their life.

I do not think I can extract my values and biases from the research process. For example, I have lived with dogs most of my life and in reading the literature (Fox, 2006) I realised I had taken-for-granted assumptions about dogs being capable of emotions and having individual personalities with their own quirks and traits. These assumptions meant that my participants did not need to convince me of their pet's subjectivity nor feel wary of using anthropomorphized accounts of their pet's behaviour. However, did my assumptions affect my interpretation of the interview data? I acknowledge that my interview data reflects a moment in time of the participant's experience and a version of events created for me and influenced by me. I am aware of my own subjectivities that influenced the questions I asked, the interaction during the interview and the way in which I interpreted the interview data afterwards. Roulston argues that exploring an interviewer's subjectivities

"entails examination of one's personal experiences and biography as a researcher"
(2010, p. 58).

Hence section 3.2 'The story of my DLaw research journey' and *figure 4* 'How my DLaw evolved and developed over time in response to external influences' are integral components of my explanation of my methodology. I am not an impartial, neutral researcher looking at something on which I have no views. Instead, I am very passionate about animal law and the human treatment of animals and I am passionate about keeping people and their pets together in rental housing. My view undoubtedly colours the way I see things when I am co-constructing data in interviews and interpreting the interview transcripts. It is important that I am transparent in acknowledging my values, assumptions and biases.

A good example of this can be found in comparing my research findings to those of Fox (2006) who conducted qualitative interviews with pet owners in Britain. The purpose of Fox's research was to assess theoretical post-humanist attempts to deconstruct Cartesian human-animal binaries by applying the theory to the lived experience of pet owners in Britain. Therefore, Fox's research explored the liminal position between pets as 'human' and 'animal' and both the researcher and participant were aware of the importance of this boundary. Fox's findings focus much more on the way owners rely on popular animal psychology to use an animal instinct model in their relations with their pet. This had little relevance to my research findings and yet both Fox and I were engaged in examining the nature of the

human-companion animal relationship within everyday practices. Why was animal agency and anthropomorphism more evident in my participants' interviews and my findings while an animal instinct model, which was very relevant to Fox's research, virtually absent in my own? One factor may be the way in which the views of the researcher and the participant's prior knowledge of the purpose of the research influence the findings. My research explored the harm caused by 'no pet' covenants and my participants had all being adversely affected by the covenants. My participants and I were therefore all focusing on the close bond the tenant has with their companion animal and emphasising the similarities – the human-like qualities of the animals - rather than the differences that separate them. Julia was the only one of my participants to make reference to a dominant, hierarchical relationship between her and her dog, Annie, and talked about the instincts of Annie as a Basset hound. Julia had worked all her life with dogs including at an animal shelter, as a dog trainer and as a dog home border and this undoubtedly influenced how she related to dogs. This example demonstrates the social constructionist assumptions that underlie my methodology in showing how the views of the researcher and the participant's prior knowledge of the research project may affect the research findings.

3.6 My sampling technique

Quantitative research uses random and representative sampling techniques in order to achieve a representative microcosm of the population to be studied thereby enabling wide generalisations to be made about the whole population (Silverman, 2017). Since qualitative research focuses on depth, nuance and complexity a different sampling strategy is used; a strategy that is based on the link between sampling and theory, rather than sampling and population (Mason, 2002). Bryman observes that

“the issue should be couched in terms of the generalizability of cases to theoretical propositions rather than to populations or universes” (1988, p. 90 quoted in Mason, 2002).

I therefore used a strategic sampling strategy known as theoretical or purposive sampling which seeks out

“groups, settings and individuals where ... the processes being studied are most likely to occur” (Denzin and Lincoln, 1994, p. 20 quoted in Mason, 2002).

thereby constructing a sample that is meaningful theoretically. Given my research aims to inquire into pet-owning tenants' lived experience of 'no pet' covenants and to understand the character and extent of the harm the covenants can cause, the criteria I chose for my sampling were:

- (i) a person who was currently, or had been, a tenant of residential property in the UK; and
- (ii) had been adversely affected by a 'no pet' covenant/policy in their tenancy agreement.

In my research 'Harm' emerges as a key theme from the data but given my selection of a sample of tenants adversely affected by 'no pet' covenants, this is not surprising. However, understanding the character and magnitude of that harm became a key focus of my research. By sampling strategically I am able to use the detailed understanding of 'no pet' covenants I acquired from my research participants more widely to make theoretical, as opposed to empirical, generalizations. Their stories are a window on the

"social and cultural environment that shaped the story's life events and the meaning attached to them" (Polkinghorne, 2007, p. 483).

Consequently my narrative analysis of their stories demonstrates "*what is possible*" (Mason, 2002, p. 196) allowing me to reflect on lessons for other settings.

I used a number of purposive sampling methods to find my interviewees:

(i) The use of social media

Social media is a valuable tool for accessing members of the public who are pet owners and tenants (Graham *et al*, 2018) and I found three of my interviewees in this way. My interest in this topic started when I signed a petition on social media about an elderly man being evicted from his care home because he had a dog. I signed the petition and left a comment offering support. Shortly afterwards I was contacted by someone leading the campaign. Ultimately, this led to me interviewing the elderly gentlemen, Bob Harvey. At the time, I thought it would be useful for post-doctoral research but later it became the focus of my DLaw. Using a 'snowball sample' technique, I acquired two other interviewees, Kate and Emma. Three people (including Kate and Emma) were recommended to me by others involved in Bob's campaign. These pet-owning tenants had separately used facebook to highlight the injustice of having to choose between their dogs and securing a new home for their family. I contacted two of them through facebook and the other through a contact I made with those involved in Bob's campaign. All three people initially agreed to be interviewed but unfortunately, one of them later stopped replying to my emails before I could interview her.

(ii) A presentation of my research

Three of my interviewees (Julia, Isabel and Lucy) were recruited through my presenting a paper on my research. Although I did not set out intending to recruit interviewees, the

conference setting gave me access to people with an interest in animals many of whom were likely to be pet owners. I was invited to give a paper at the Society of Companion Animal Studies (SCAS) conference in March 2018. At the end of my presentation, a member of the public (together with her dog) approached me to tell me her story of her experience of 'no pet' covenants. She agreed to be interviewed as part of my research so I took her contact details and we eventually met four months later. Another interviewee heard my presentation at the Oxford Centre for Animal Ethics summer school in July 2018. She was an international student at Oxford University and approached me after the presentation to share her experience of 'no pet' covenants in England. There was no opportunity to talk further at that time and she returned to Spain thereafter, but she kindly shared her experience, via email, by answering my written questions to her. Finally, I recruited an interviewee from my animal law undergraduate students. I gave a talk on my research in one of my animal law teaching sessions and one student shared her experience of 'no pet' covenants with the whole seminar group. A few months later, after she had completed her studies (she was a final year student), I emailed her to ask if she would be willing to be interviewed and she agreed. I chose not to contact her until after she had graduated and left the University so she would not feel any sense of pressure to participate based on our student/lecturer relationship. In fact, the primary pet owner was her boyfriend, so I interviewed them both together.

(iii) Observation of the public

I decided to talk to someone who was homeless and living with a dog on the streets to hear of their experience of 'no pet' covenants. Existing research in the USA suggests that the use of 'no pet' covenants contributes to homelessness (Irvine, 2013a). I knew from previous visits to Oxford that there are many homeless people with dogs in the city centre so when in Oxford for the animal law conference in July 2018, I took the opportunity to talk to a homeless pet owner. I observed David begging on the street with his Jack Russell dog and I approached him, explained my research and asked if I could interview him. He acknowledged that he had been adversely affected by 'no pet' covenants which contributed to his homelessness and agreed to be interviewed.

Therefore my choice of whom to interview was influenced by the experience of my research participants (they were all part of a group of people who were, or had been, pet-owning tenants adversely affected by 'no pet' covenants) and their easy access (in terms of finding and liaising with people through social media or in person at specified events and settings). I agree with Mason that qualitative sampling can be an "*organic practice*" (2002, p. 125) that

grows throughout the research process as the shape of the project develops and therefore I did not need to decide on a definitive number of research participants at the start. Using purposive sampling over the course of a year gave me seven in-depth interviews. I found that due to the high level of homogeneity amongst my participants, data saturation occurred at an early stage with no new themes arising in the later interviews. Homogeneity arose from the fact that all of my participants were tenants of residential leases and all had very close relationships with their companion animals, akin to family, which meant they all shared an adverse experience of 'no pet' covenants that resulted in harm often of a similar character and magnitude. Guest, Bunce and Johnston (2006) also experienced early data saturation in their research study on reproductive care in Africa. They had a sample of 60 women but found that 34 of their 36 codes developed in their study came from the first six interviews. They suggest that for studies with a high level of homogeneity among the population

"a sample of six interviews may [be] sufficient to enable development of meaningful themes and useful interpretations" (2006, p. 78).

My experience supports this view. I found seven interviews were enough to cause data saturation with no new themes emerging and in consequence, I chose not to interview any more tenants.

My interviewees were of a variety of ages and were of both sexes as demonstrated in *Table 2* below. Some of this was a result of a deliberate strategy and other was due to chance. After interviewing an 87-year old man with no family who fitted the ideal candidate for a lonely person desperate for the company of his dog (Serpell, 1996), I was keen to find younger people who had fulfilling human relationships who may therefore be less likely to view their dog/cat as a family member. I interviewed three pet owners who were in long term, happy relationships as well as a pet owner who had a young family (a husband and two young children). These could be seen as 'deviant' cases (Silverman, 2014) where the close human-human relationships make it less likely the participants will see their pets as family.

Table 2 – My research participants and their companion animals

Name of tenant (pseudonym)	Type of animal	Name of pet (pseudonym)	Age (years) of tenant	Living arrangements of tenant
Bob (real name)	Dog (Schnauzer)	Darkie (real name)	80+	Alone
Julia	Dog (Basset hound)	Annie	60-70	Alone
Kate	Two dogs (Labrador and Staffordshire bull terrier)	Honey and Roxie	30-40	Young family
Lucy and Josh	Cat	Simba	20-30	Couple
David	Dog (Jack Russell)	Mack	30-40	Alone
Isabel	Two cats	Badger and Marmite	20-30	Couple
Emma	Dog (French bulldog)	Anton	40-50	Couple

3.7 My interview technique

I chose to use predominantly unstructured in-depth interviews to allow the participants freedom to tell their story in their own words. The use of unstructured interviews fits with my epistemological position that a legitimate way to generate data is to talk interactively with people and to analyse their language and meanings. My view is that knowledge is situational and contextual. I concur with Mason that

“meanings and understandings are created in an interaction, which is effectively a co-production involving researcher and interviewees” (2002, p. 63).

I was conscious that I could be co-constructing the idea of the dog or cat as a family member. Could the interview dialogue lead the participant to think about their relationship with their dog in a particular way (e.g. as a family member) that they had not previously thought about? With this in mind, I sought to ask open questions to allow participants to explore their own interpretations and not to provide my own preconceived views. For example, *Could you tell me the story of your pet? What words would you use to describe your relationship with your pet?* (Interview Guide, Appendix 4). I wanted to see what

language they chose to use. My interviews were flexible and conducive to emergent reflections. Mason observes that,

“It is a much more complex and exhausting task to plan and carry out qualitative interviews than, for example, to develop and use a structured questionnaire for asking a set of predetermined questions” (2002, p. 67).

I needed to think on my feet in the interview and make on-the-spot decisions about the questions, sequence and probes. On the whole I tried not to interrupt the flow of talk and was generally reserved in contributing to the talk preferring the participant to take the lead allowing me to follow them “*down their trails*” (Riessman, 2008, p. 24) . I sought to be an attentive listener. All the face-to-face interviews lasted approximately 1.5 hours except for the one with David, the homeless man I interviewed while he was begging on the street. David’s interview was very short because he gave short answers to all my questions and did not want to elaborate or tell stories. I found this the hardest interview to do especially as it was the end of a long day of listening to presentations at a conference and I was tired. I was not fully prepared for David’s unresponsiveness and on reflection I wanted to speak to him again to delve a little deeper into his answers but I never saw him again. All my other interviews, involving direct dialogue, were “*an exciting and enriching experience*” (Kvale and Brinkman, 2009, p. 123). My participants seemed to enjoy the opportunity to share their experiences with such an attentive audience and I enjoyed listening to them.

Mishler (1995) distinguishes between the ‘told’ and the ‘telling’ and whilst my data analysis focuses on the ‘told’ it is also worth considering the ‘telling’ – *how* a narrative is created - in particular, the audience and the local context that generates the narrative. In each of my interviews I let the interviewee choose the location of our meeting, some took place in their homes or a place with a special connection to the pet (see *Table 3 - Context of the interview*). Giving an interview, especially when it involves signing a lengthy ethics consent form at the start, is not an ideal environment for persuading someone to speak openly about something personal to them. I wanted the interviewee to be on their own territory to help them feel comfortable, preferably in the presence of their pet. In most cases, the interviewee had prior knowledge of my views on companion animals and ‘no pet’ covenants; some had heard my presentation or read my article.

Table 3 – Context of the interview and participant’s prior knowledge of my views

Interviewee (pseudonym)	Location of the interview	Pet present	Anyone else present?	Interviewee’s prior knowledge of my views on the use of ‘no pet’ covenants
Bob (real name)	Home	Yes	Yes – friend of Bob	Yes
Julia	Local park where she walked her dog	No	No	Yes
Kate	Home	No	Yes – baby and husband	Yes
Lucy and Josh	Home	Yes	No	Yes
David	Street (where he was begging)	Yes	No	No
Isabel	Email exchange	NA	NA	Yes
Emma	Telephone conversation (at home)	Yes	No	Yes

In re-telling the story of their experience of ‘no pet’ covenants, participants are interpreting their own past (Riessman, 2008). The story of their experience is dependent on the context – it could be different at another time and place and for a different listener. Most of my interviews were conducted after the crisis event so that the problem caused by the ‘no pet’ covenant had been resolved, for example, Bob had found a new home that accepted his dog. Re-telling their story required the participants to look back on the unpleasant event from a safe distance. However I interviewed Julia while she was in the middle of a crisis event (her dog had recently died and the local authority landlord would not allow her to have another dog in her flat) and her story was one of pain. One of the strengths of narrative inquiry is its ability to encompass the temporality of experiences and the shifting interpretation of events over time (Bell, 2002). Julia’s pain was still evident when I met with her one year later but her story was different by that time and she was emerging as a fighter of injustice rather than a victim of loss and grief. That the narrative is context-dependent and

interpretations can change over time does not detract from the validity of the interview data because I do not seek a realist description of some objective truth but instead the meanings attached to the individual's experience. Portelli observes

“Oral sources ... are not always reliable in point of fact... Rather than being a weakness, this is however, their strength: errors, inventions and myths lead us through and beyond facts to their meanings” (1991, p. 2, quoted in Bell, 2002).

After explaining the consent form and getting the participant to sign the form, I decided to start my interviews with very open, unstructured questions, for example, *tell me the story of your dog?* The interview took the form of a conversation in which I would comment or ask questions as and when I felt it appropriate. All of the face-to-face interviews (except for Bob and David) involved the participant showing me a photograph of their pet. Prior to the interview, I had asked them to choose one or two photographs that showed their relationship with their pet that they would be willing to show me. This acted as an excellent icebreaker as everyone loves to show photographs of their pet but it was also a useful visual tool to get the participant to think about the nature of their relationship with their pet in advance. In planning my methodology, I had considered using the photographs for data analysis using visual methodology (Rose, 2016) but subsequently felt that I had sufficient data from the interview conversation alone. However, drawing on existing research (cited in Sliverman, 2017) I may use the photographs in post-doctoral research on the human-companion animal relationship (within the ethical approval period). The photographs helped to build rapport at the start of the interview, which is important so participants feel they can share their experiences openly. In most cases, I had already had contact with the participant prior to the interview either in person or through email so I had already worked at building some rapport even before the interview. I did have a pre-prepared interview schedule with some questions I could use if needed (see the Interview guide, Appendix 4) but I was guided by the individual conversation and did not use all these questions in every case. I assumed an *“open listening stance”* (Polkinghorne, 2007) to give the participants freedom to explain their relationship with their dog or cat and their experience of ‘no pet’ covenants in their own words and not to impose my constructions on them.

Table 4 - The general format of my initial interviews

Sequence	What	How and why
1	Opening - consent form; ethics; complaints procedure	I explained the aim of the research and nature of the interview process. We talked through the contents of the <i>Researcher Information Sheet</i> which includes a consent form and I explained whom to contact in the event of complaints. I asked if I could audio record the interview (all consented to this).
2	Photographs of companion animal	Prior to the interview I asked the participant to find one or two photographs of their pet that showed something about their relationship with their pet. We discussed the photographs the participant had chosen to show me. This was an excellent icebreaker, helped to build rapport and was a very enjoyable part of the interview.
3	Questions on the human-companion animal relationship	I asked very open questions about the participant's relationship with their companion animal including everyday routines and practices of the pet within the home. These questions generated rich data often in the form of stories.
4	Questions about the participant's experience of 'no pet' covenants	I asked questions about the 'no pet' covenants. Some of these questions were more structured as I needed specific information about the type of lease, type of landlord, wording of the 'no pet' covenant, but I also wanted to give participants the chance to explain their experience of 'no pet' covenants in their own words so used some open questions too.

All the initial interviews were audio recorded with the participant's consent (with the exception of the one interview by email exchange). By transcribing most of the interviews myself I was able to get close to the data early on and reflect on both the data itself and the method of its generation while the interview was still fresh in my mind. Transcription is also an interpretation, for example, in deciding where to put the grammar and whether to include pauses or laughter (Elliot, 2005). Overall, I tried to transcribe verbatim and to indicate

pauses and laughter. I also wrote notes in my reflexive journal straight after the interview with reflections on how the interview went and what the participant was like and I found that it was useful to refer back to these notes during my data analysis.

With a number of my participants, the interview created an association that continued afterwards. Bob and I became friends and my family and I visited him on a number of occasions. Both Julia and Kate have kept in touch with me; I helped Kate draft a letter to her local MP complaining about the use of 'no pet' covenants and advised Julia when her local authority landlord proposed to implement a blanket ban on pets in housing for the elderly. The fact that I have a continued association with these participants made it easier for me to send them the stories I crafted from their interviews and to meet them again one year after their initial interviews to discuss my data analysis (Bell, 2011). This iterative process of returning to the participants allowed them to give me honest feedback on my interpretations of the data and strengthens the trustworthiness of my analysis (Lincoln and Guber, 1985; Polkinghorne, 2007).

3.8 My methods of data analysis

Data analysis has been characterised as the most complex phase of qualitative research (Thorne, 2000; Nowell *et al*, 2017). I adopt a mixed analysis approach to my research with three phases of analysis: firstly, thematic content analysis of seven in-depth interviews; secondly, narrative analysis of four of those interviews and thirdly, black letter law analysis of the relevant law in England relating to 'no pet' covenants.

I started with thematic content analysis which is a highly flexible and accessible form of analysis, particularly useful for those new to qualitative research because it is relatively free of prescriptions and procedures (Braun and Clarke, 2006). Thematic analysis is

"a method for identifying, analyzing, organizing, describing, and reporting themes found within a data set" (Nowell *et al*, 2017, p. 2)

and allows me to compare and contrast the perspectives of all my participants highlighting similarities and differences between them (Braun and Clarke, 2006). I used Computer Aided Qualitative Data Analysis software NVivo 12 to initially code the interviews to help me make sense of the data and identify broad themes. I already had a number of themes from my literature review so it made sense to start the analysis by considering the relevancy of these themes to my interview data. This proved to be very useful but I wanted to dig deeper so I chose to use narrative analysis as a second stage of analysis.

I read about narrative analysis in preparing my DLaw proposal and it resonated with me because it fits my Social Constructionist worldview, acknowledges that people make sense

of random experiences by imposing story structures on them and recognises that stories do not exist in a vacuum but are shaped by cultural narratives (Bell, 2002). I was particularly drawn by Riessman's (1990) book *Divorce Talk* because at that time I was researching pet custody disputes arising from a couples' separation or divorce so the book was especially relevant. Narrative analysis has its origins in literary criticism (Bell, 2002; Eatherly and Cronin, 2008) and while it has been used extensively to explore people's experience of education, illness, death and identity (Clandinin and Connelly, 2000; Bell, 2002; Thomas, 2012; Lee *et al*, 2013; Thomas *et al* 2018) it is relatively unknown in legal research, an exception being Amsterdam and Bruner (2000) who demonstrate the significance of narrative within the context of the law:

"Law lives on narrative ... For one, the law is awash in storytelling. Clients tell stories to lawyers ... As clients and lawyers talk, the client's story gets recast into plights and prospects... This endless telling, casting and recasting is essential to the conduct of the law" (Amsterdam and Bruner, 2000, p. 110).

What makes narrative analysis a particularly attractive method of analysis in my research is its focus on understanding people's experience of the social world. I read numerous studies which demonstrated this including the recent study by Thomas *et al* (2018) on palliative care which sought to understand the experience of family carers looking after terminally ill adults in the home. More relevant to my research topic was Irvine's study on homelessness. She uses the narratives of 75 homeless people to explore how their relationship with their dog or cat affects their personal identity, for example, some people construct their dog as a life-changer or life-saver through a story of redemption (Irvine, 2013a; 2013b). Subsequently, Carr used the narratives of the homeless people in Irvine's study to reevaluate the concept of care in the context of homelessness (Carr, 2016).

Personally, I find stories a powerful way to understand the social world. In 2016, I visited Dachau Concentration Camp in Germany. There was an overwhelming volume of data about the camp. I was bombarded with facts and statistics, which seemed to bounce off me, but what touched me most were the individual stories that seemed to bury themselves into my consciousness and force me to feel, empathise and understand. A participant of the Remembrance Book Project at Dachau observed that

"The history of the world is formed by the stories of individual people" (2011, p.1).

This conforms with my view of the social world of humans, that there is an interconnectedness between narrative and human experience. I agree with Sabrin that,

"human beings think, perceive, imagine, and make moral choices according to narrative structures" (1986, p. 8).

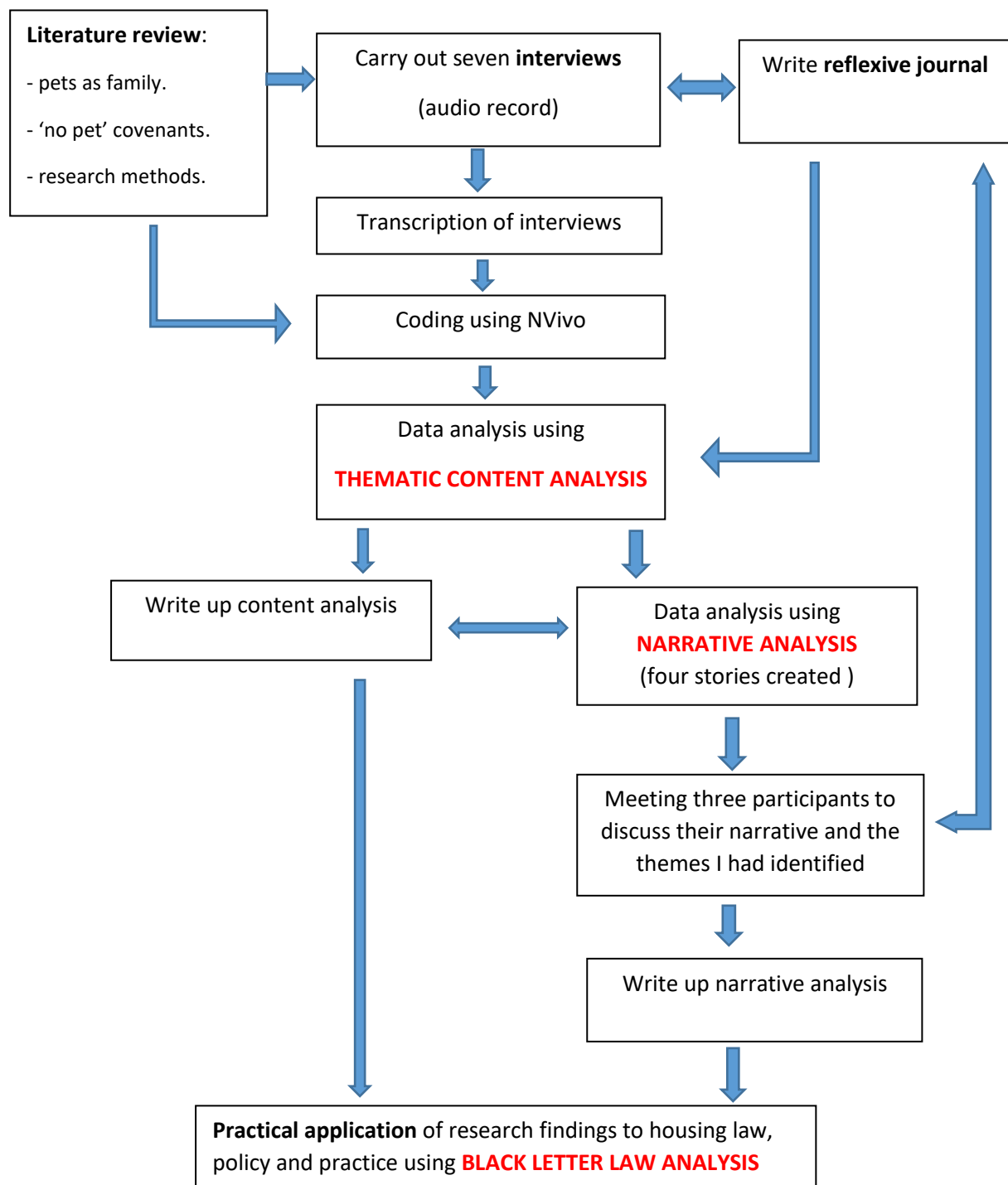
Therefore, one of my research's original contributions to the field is the use of narrative analysis to help critically assess the relevant law and evaluate the need for legal reform in housing law.

In *Divorce Talk* Riessman adopted a similar dual approach of thematic analysis followed by narrative analysis. First, she coded her interview transcripts using grounded theory that enabled her to develop themes to conceptualise the taken-for-granted assumptions about a companionate marriage. Her use of grounded theory proved useful but also had its limitations,

“the method necessitates fragmenting the interview text into codable chunks that share a common content area or topic” (1990, p. 229).

She wanted to read the data holistically rather than breaking it up so she also used narrative analysis for those parts of the transcripts that included a narrative. This led to new findings that were not apparent from the grounded theory analysis. I decided to adopt a similar process of dual analysis of the interview transcripts but, like Thomas *et al* (2018), in their palliative care study I used a deductive thematic content analysis rather than grounded theory. *Figure 5* shows my research process and demonstrates the links between my three methods of analysis.

Figure 5 - My DLaw research process (years 2 and 3) demonstrating the links between my three methods of analysis



In reality my research process was not as linear as the above diagram indicates because of my flexibility in responding to external factors. For example, I wrote an article for the Liverpool Law Review (animal law special edition) and submitted a response to the Scottish Parliament Public Petitions Committee before I completed my data analysis. This meant engaging with the black letter law analysis at an earlier stage in the research process than the diagram shows but returning to it later. This is not uncommon in qualitative research where the stages of data collection, analysis and writing up may be interrelated and occur concurrently as the researcher moves back and forth between the stages (Nowell *et al*, 2017).

3.8.1 Phase one: Thematic content analysis of seven in-depth interviews using NVivo 12

I found NVivo 12 a useful tool to help me sort and organise my interview transcripts into codes (Bazeley and Jackson, 2013). The software programme helps researchers organise their data, but provides no help with the intellectual process of conceptualising codes (Thorne, 2000). Saldana describes a code in qualitative research as

“a word or short phrase that symbolically assigns a summative, salient, essence-capturing, and/or evocative attribute” (2009, p. 3)

for a portion of data. Initial codes were generated deductively based on existing research from my literature review, for example, ‘rental insecurity’ (Power, 2017) and others emerged from the interview data itself, for example, ‘detrimental changes to everyday practices’. I allocated virtually the whole transcript of each interview to codes and individual extracts of data could relate to many different codes (Braun and Clarke, 2006). I used the codes cross-sectionally across my whole data set. During coding I used my reflexive journal to reflect on how my ideas and thoughts about the codes emerged and evolved over time as I engaged more deeply with the data. This first stage of coding was time consuming as I repeatedly listened to and read the transcripts to immerse myself in the data *“in an active way”* (Nowell *et al*, 2017, p. 5) to search for meanings and patterns. I enjoyed the creative process of this initial stage of coding in which I sought to generate as many codes as possible without preconceptions about which would prove to be the most useful. I embraced the intuitive nature of the analysis,

“what is unique about thematic analysis is that it acknowledges that analysis happens at an intuitive level. It is through the process of immersion in the data, considering connections and interconnections between codes, concepts and themes that ‘aha’ moments happen” (Savin-Baden and Major, 2013, p. 440).

I was aware of the subjectiveness of my choosing particular codes over others, for example, I used a code for “anthropomorphic model” in which I collated participant’s accounts of companion animals attributed with human emotions such as jealousy (based on Fox, 2006). Another researcher may have coded this same data under “animal emotions”. Codes are rarely simple representations; they are invested with meanings. Saldana observes,

“Coding is not a precise science; it’s primarily an interpretative act” (2009, p. 4).

I appreciate that coding is *“a process of reflection”* (Nowell *et al*, 2017, p. 5) so I documented my thoughts about potential codes in my reflexive journal. After coding two interviews I had 43 codes and found that the remaining five interviews provided only two new codes (See Appendix 3 for a full list of the initial codes and the link between these codes and my final set of themes). This evidence of data saturation early on suggested to me that there was no

need to do any further interviews for such a homogenous group (Guest, Bunce and Johnson, 2006). The homogeneity of the group arose from my purposive sampling because it meant each member of the group had a very close bond to their pet that led to their experience of 'no pet' covenants being a harmful one.

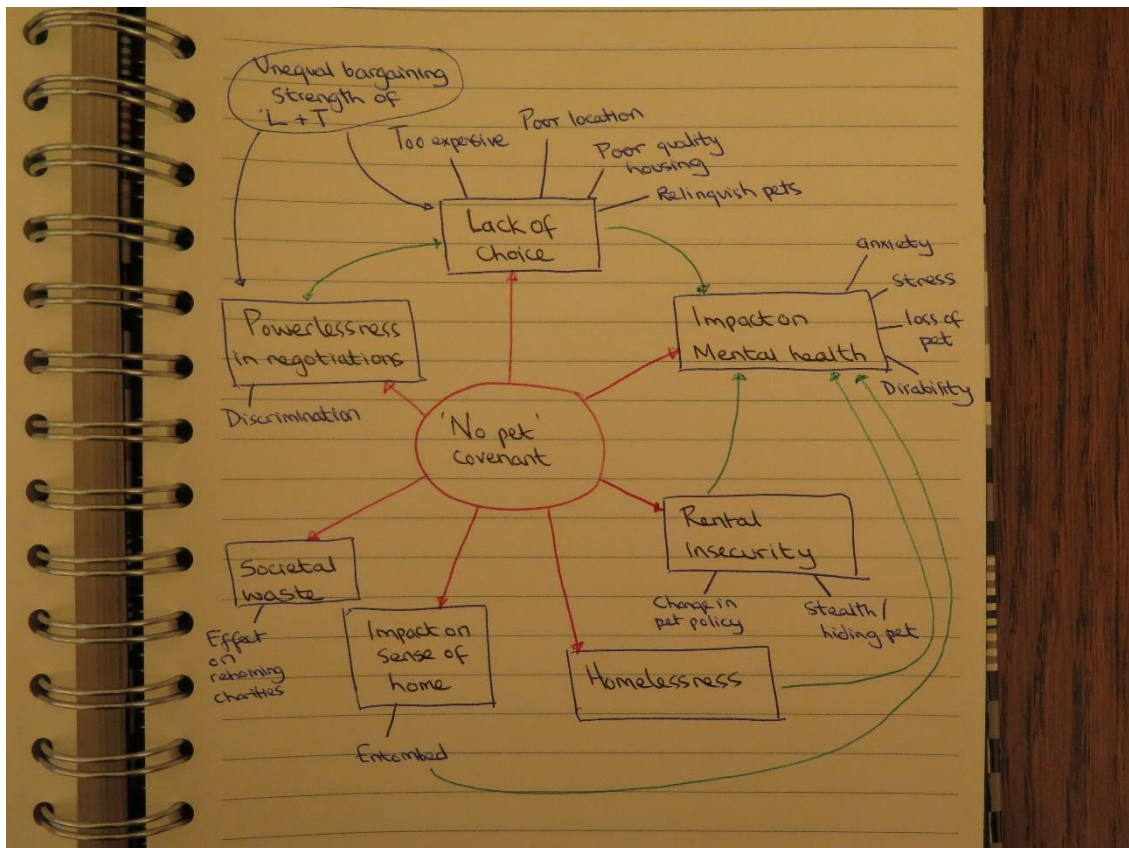
After this first phase of open coding to generate my initial codes, I undertook a phase of sorting, collating and comparing codes to make connections between them and identify themes. A theme is an abstract entity that links portions of data together to bring meaning and captures something important in relation to the research question (Nowell *et al*, 2017; Braun and Clarke, 2006). Saldana noted the importance of this stage of data analysis

“coding is not just labelling, it is *linking*” (2009, p. 8).

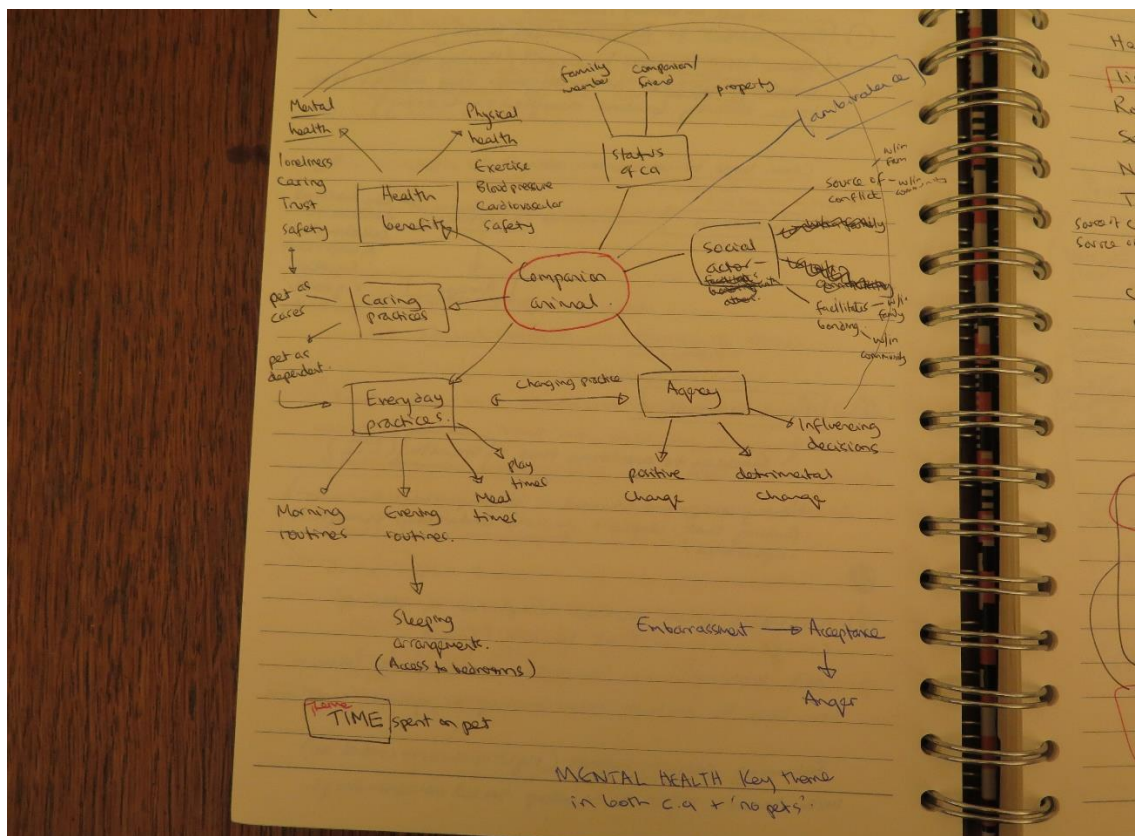
This involved a process of amalgamation, reducing the expansive set of first stage codes to a smaller and a more focused set by making links and connections between codes and ultimately identifying themes (Braun and Clarke, 2006). For example, a number of codes, such as 'emotional benefits', 'physical benefits', 'safety', 'trust', 'caring practices' could all be amalgamated under the theme 'Support'. Similarly, I amalgamated my three codes 'everyday routines', 'sleeping arrangements' and 'access to home spaces' into a single 'Everyday Practices' code which eventually became part of the 'Agency' theme. I used mind maps and diagrams to help me interrogate the codes and creatively think about how they fit together allowing me to visualise the links between them to identify themes. *Figure 6* gives examples of mind maps from my reflexive journal.

Figure 6 - Examples of mind maps in my reflexive journal

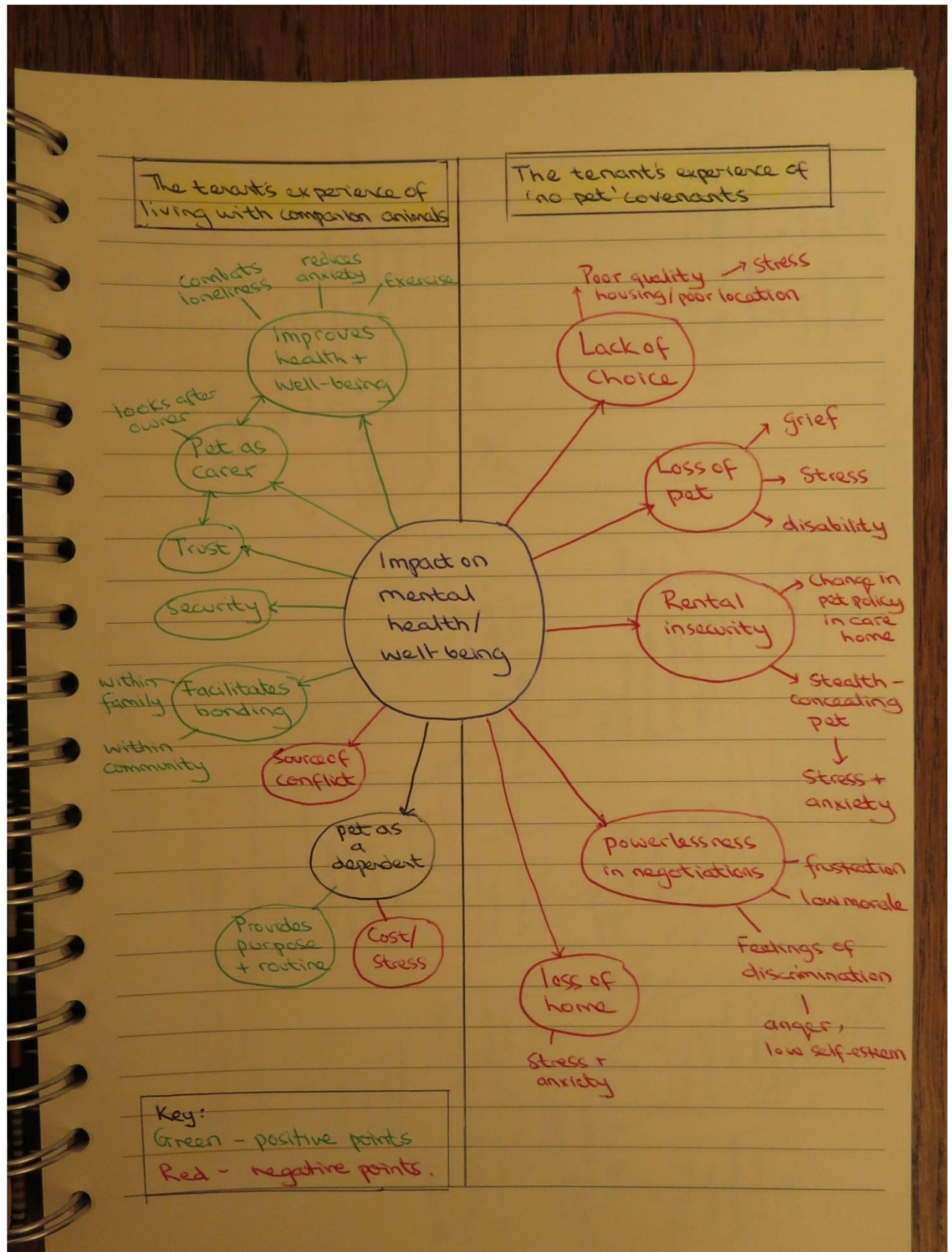
(a) Reflecting on the links between codes/themes relating to 'no pet' covenants demonstrated the importance of the Mental Health theme



(b) In this mind map I am thinking about the links between codes/themes for the human-companion animal relationship



(c) This mind map shows the importance of the Mental Health theme



Lincoln and Guba (1985) suggest the accuracy of the themes can be tested by returning to the raw data and comparing the data to the themes to make sure the findings are firmly grounded in the data. Once I had my themes, I repeatedly read my interview transcripts to ensure the themes I had identified would clearly fit with the data. I thought carefully about naming themes – some arose from existing research, others from the data itself. I sought to give a name that clearly encapsulated what the theme was about (Braun and Clarke, 2006).

I identified seven key themes across the seven interviews. These key themes are:

1. Agency
2. Social support
3. Ambivalence
4. Rental Insecurity
5. Lack of Choice
6. Powerlessness in Negotiations and perceived Discrimination
7. Mental Health

Next, I defined each theme and reflected on how it would fit into the overall story of the complete data set in relation to the research questions (Braun and Clarke, 2006). Nowell *et al* observe that

“Part of telling the story was ordering the themes in a way that best reflected the data” (2017, p. 10).

I ordered the themes into two distinct sections: first, themes relating to the human-companion animal relationship and second, themes arising from the tenant’s experience of ‘no pet’ covenants. I created a mind map for both sets of themes to help me think about links in the themes and their importance in my final analysis. For example, my mind map on ‘no pet’ covenants showed that the ‘Mental health’ theme is a key theme because most of the other themes link to it (see *figure 6* – examples of mind maps in my reflexive journal).

My write up relied extensively on direct quotes from participants in order to aid understanding, give readers a flavour of the original texts (Nowell *et al*, 2017) and convince readers of the trustworthiness of my analysis (Braun and Clarke, 2006). Once I had described the themes and their patterns of interconnectedness, I progressed to ‘interpretation’ allowing me to theorise the significance of the patterns and their broader meanings by reference to the existing literature and in relation to my research questions. By intertwining my findings with the current literature, I was able to show where my findings were supported by, contradicted or added to the existing body of knowledge on ‘no pet’ covenants.

3.8.2 Phase two: Narrative analysis of four interviews

The reductionist approach in my phase one analysis facilitated insights into the interview data and provided a framework of broad themes. However, it focused solely on the content of what the interviewee said. Narrative analysis provides a

“window into people’s beliefs and experiences” (Bell, 2002, p. 209)

allowing me to explore the socially constructed nature of the interview data recognising that it is not necessarily a true representation of the participant’s experience of ‘no pet’ covenants. It represents what they chose to tell me at that moment in time and in the context of a research interview involving two-way dialogue between two strangers. Their story may have been different at a different time, in a different context, to a different person. The attention narrative inquiry gives to the *“temporal unfolding of human lives”* (Polkinghorne, 2007, p. 472) is one of the key strengths of the method. Narrative analysis enables me to acknowledge this, which is an important aspect of my epistemological approach located within the Social Constructionist paradigm.

The sorts of questions I ask from a narrative perspective include:

“‘What is the purpose of the story?’, ‘Why does it occur at this point in the conversation?’, ‘How have the researcher or others present influenced the narration?’, or ‘How does this excerpt fit with the other parts of the interviewee’s life story as narrated during the interview as a whole?’” (Earthy and Cronin, 2008, p. 21.4).

In explaining my use of narrative analysis, it is important to appreciate from the start that there is

“no single narrative method, but rather a multitude of different ways in which researchers can engage with the narrative properties of their data” (Elliot, 2005, p. 37).

Lieblich *et al* (1998) identified four combinations of the ‘unit of analysis’ and the ‘focus of analysis’ in narrative analysis. I chose the ‘holistic-content’ combination as opposed to the ‘holistic-form’, ‘categorical-content’ and ‘categorical-form’ combinations (Lieblich *et al*, 1998, p. 13). Adopting the ‘holistic-content’ combination means that my ‘unit of analysis’ is the narrative as a whole and I use a holistic approach to understand how a section of the interview text is part of the life story of an individual. Since I aim to explore the effects of ‘no pet’ covenants especially the character and magnitude of the harm on the life of the tenant, this approach is particularly well suited for my research. My ‘focus of analysis’ is on the *content* as opposed to the *form* of the interview encompassing both surface content (for example, what happened? when? who was there?) and latent content (what were the

motives of the participants? What is the meaning of the story for the narrator?) (Earthy and Cronin, 2008, p. 21.5.2). In this way, my inquiry goes beyond storytelling to allow

“an analytic examination of the underlying insights and assumptions that the story illustrates” (Bell, 2002, p. 208).

Riessman (2008) observes that this sort of thematic narrative analysis focusing on the content of the interview is the most common method of narrative analysis. She notes it is often confused with grounded theory in the literature but there are key differences. Most notably, narrative analysis adopts a holistic reading of the text and keeps the story intact by theorising from the individual case enabling me to identify narrative threads that run longitudinally through each interview, whereas grounded theory analysis breaks down the data into thematically coded segments and ignores the sequence of the data. Analysis based on grounded theory theorises from categories across cases whereas narrative analysis is case centred.

Savin-Baden (2004) recommends writing a biography of each participant. Instead of a biography I decided to craft a story for four of my participants (Bob, Julia, Kate and Lucy); the story of their experience of ‘no pet’ covenants. The story emerges from the interviews and provides a chronology and structure to the otherwise messiness of the dialogue, but attempts to stay true to the voice of the participant by my commitment to *“letting stories breathe”* (Irvine, 2013a, p. 21) and incorporating participant quotes so that the authentic voice of the participant is not lost (Clandinin, 2006). I repeatedly listened to the audio recording, read the transcript and read the notes I made in my reflexive journal during and immediately after the interviews, and from this I created a story of each participant’s experience of ‘no pet’ covenants. The process of writing (and rewriting) each story was a form of analysis and through it I gained valuable insight into the participant’s experience of ‘no pet’ covenants. Each time I had to really think about what was happening, how the participant felt, what it meant to them and how the story was being co-created by the narrator and audience. The stories are interspersed with my words as well as the participant’s words but I try to use the participant’s own words wherever possible in order to keep the story as authentic as possible. In addressing my research questions, it is important to hear the voice of the pet-owning tenant. I agree with Riessman that,

“Meaning is ambiguous because it arises out of a process of interaction between people: self, teller, listener and recorder, analyst and reader. Although the goal may be to tell the whole truth, our narratives about others’ narratives are our world creations” (1990, p. 15).

These four stories are my ‘world creations’ inevitably influenced by my own values and biases but I hoped to capture each participant’s meanings. After I had crafted the four stories, I gave each of the four participants the opportunity to read their own story and to

meet to discuss it to ensure I stayed true to their meanings. I visited Bob in his home in April 2019, I met with Kate in a café in June 2019 and I met with Julia at the Society of Companion Animal Studies conference in September 2019. I sent the participants their story in advance of the meeting together with a list of themes or “*narrative threads*” (Thomas *et al*, 2018, p. 952) I had identified. During the face-to-face meetings, I asked them about their thoughts on the story and the themes. I made contemporaneous notes of the meeting in my reflexive journal and used the opportunity to dig deeper into some of the issues I had identified as significant. These meetings, one year after the initial interviews, were extremely informative but also acknowledge the temporal notion of experiences and their meaning, this being one of the advantages of narrative analysis (Bell, 2002). Bob, Julia and Kate were all happy with the story I had crafted and agreed with the themes. Julia thanked me for creating such a sympathetic story that captured her experience. She had shown the story to her friend because she felt it explained how she felt in a clear and concise way that her friend could understand. Unfortunately, Lucy and Josh did not respond to my emails so I did not benefit from their feedback on my analysis of their initial interview. This process of data triangulation (Roulston, 2010), in the form of more than one interview over a period of time to check the researcher’s understanding of views and to compare findings from earlier interviews, strengthens the trustworthiness of my data analysis (Polkinghorne, 2007).

I did not use narrative analysis for three of the interviews (David, Isabel and Emma) because I did not feel there were sufficient narratives in these interviews to support this method of analysis. David was homeless and begging on the street when I interviewed him and his interview was very different from the others because he answered my questions with brief one-sentence answers. He did not elaborate or tell a story. I was unprepared for such short answers and it was hard work to keep the conversation flowing. However, there is still some very rich and insightful data from his interview not least because he had such a close relationship with his dog, Mack, that he was prepared to sacrifice shelter in order to retain that relationship. The other two interviews were carried out without a face-to-face meeting; one by email exchange and another by telephone. This may have reduced the number of narratives in these interviews (Irvine, 2011). Although some scholars argue that it is possible to generate rich narrative data from telephone interviews (Drabble *et al*, 2015) my own experience left me favouring face-to-face interviews.

The holistic approach adopted in narrative analysis is especially useful in understanding complexity, detail and context (Webster and Mertova, 2007). Riessman’s (1990) holistic reading of her interview transcripts on divorce, uncovered new findings that were not apparent from her grounded theory analysis. A poignant example of this comes in the form of Tessa. She told of her dominant and abusive husband who raped her. Using grounded

theory a researcher may identify the complaint 'marital rape' as the cause of her divorce. Narrative analysis, which examined her story holistically, taking into account the way she chose to organise and make sense of her experience, found a more complex cause for the divorce. She was raped a number of times by her husband but did not leave him. It was only when she herself became violent that she left him. Through narrative analysis, Riessman discovered that

*"The point is that Tessa can no longer contain her **own** aggression; this is the turning point. She has taken on the identity of a survivor, rather than that of a victim"* (1990, p. 93).

Ultimately, the reason for Tessa's divorce was marital rape so using grounded theory analysis to code it as this is not inaccurate but it fails to appreciate the complexity of the situation. It was Tessa's *own* violence, in response to that of her husband's, which instigated the divorce.

In the same way, using a holistic narrative analysis allowed me to recognise and acknowledge the complexity of Julia's social situation. After referring to the death of her dog, Julia said,

"I'm just lost. I've just absolutely nothing. I've worked with dogs all my life. I've lived with dogs all my life".

A method of analysis that breaks up the data into components may identify this sense of loss as solely attributable to the dog's death because the words immediately followed a reference to her dog's death. However, when put in the wider context of what was happening in Julia's life at that moment, and reading the transcript holistically and temporally, showed more complex reasons for her overwhelming sense of loss. Shortly after her dog's death (and partly as a result of it) her son separated from his partner. The split was acrimonious and the ex-partner restricted Julia's access to her young granddaughter. Narrative analysis allowed me to take into account the wider context of her words and thereby acknowledge the complex and interrelated reasons for her intense sense of loss. Experience and context are inextricably linked so to understand Julia's experience of loss, I need to appreciate the context of it. I need to know what was happening in Julia's life at that time and how she perceived it. Webster and Mertova observe,

"Narrative is not an objective reconstruction of life – it is a rendition of how life is perceived" (2007, p. 3).

This means that the interview data is specific to those participants at that moment in time, and provides little scope for generalisations to predict how others will respond to a similar event. However, that does not mean that the data is of no wider value to society. On the contrary, people do not exist in a social vacuum and

“meanings are not only a private construction – the property of individuals – but have a collective counterpart, representing history and cultural understandings” (Riessman, 1990, p. 13).

Just as Riessman was able to use private accounts of the divorcees she interviewed to uncover background knowledge and taken-for granted assumptions about the modern family that many people in America shared at that time, so too my participants’ private accounts of their experience of ‘no pet’ covenants, allow me to uncover wider cultural themes and assumptions about our relationship with pets and the effect of ‘no pet’ covenants in England. Irvine talks of *“the Cultural Shaping of Narrative”* that revealed culturally specific assumptions about the human-animal relationship in twenty-first century America through her analysis of the narratives of homeless pet owners (2013a, p. 164). My participant’s private accounts are what Riessman calls *“cultural products”* because

“individuals create personal understandings out of the materials that are available to them, including publicly available meanings” (1990, p. 68).

These meanings are culturally and historically specific. Therefore, the close bonds pet-owning tenants in the UK share with their dogs and cats can be viewed as *‘cultural products’*, evidence of changing societal views of companion animals that allows them to be seen as valued family members.

3.8.3 Phase three – black letter law analysis

My thematic content analysis of all seven interviews and my narrative analysis of the four stories I crafted sought to address my research questions 1-3 about the nature of the human-companion animal relationship and the lived experience of ‘no pet’ covenants for pet owning tenants in the UK. Phase three of my data analysis involved black letter law analysis (using the insights I gained from answering research questions 1-3). To answer the legal issues in my research questions 4-6, I critically analysed the relevant law in England. As there is no specific legislation regulating the use of ‘no pet’ covenants, I turned to contract law, specifically the Consumer Rights Act 2015, to consider the legality of including ‘no pet’ covenants in tenancy agreements. Thereafter, I examined housing law to critically analyse the enforcement of ‘no pet’ covenants in possession proceedings between landlords and tenants. Finally, I evaluated the need for new legislation to regulate the use of ‘no pet’ covenants in England.

3.9 Research quality

The theoretical assumptions underpinning narrative analysis renders the realist assumptions of how to measure research quality problematic. A realist sees research validity as being able to demonstrate the ‘truth’ of what you found but as I believe there is no one truth out there to be observed or measured I cannot validate my research by its ‘truth’.

Polkinghorne advocates that validating knowledge claims is an “*argumentative practice*” to convince readers (2007, p. 476). Different kinds of knowledge claims require different kinds of evidence to validate the research. He argues that to validate knowledge claims about understanding human experience requires evidence

“in the form of personally reflective descriptions in ordinary language and analyses using inductive processes that capture commonalities across individual experiences” (2007, p. 475).

To convince readers of the validity of my knowledge claims about the meaningful experiences of pet-owning tenants I need to provide “*sufficient justification*” (Polkinghorne, 2007, p. 476) by recording and presenting my evidence and argument to the reader with an “*auditable decision trail*” (Nowell *et al*, 2017, p. 3) that allows them to make their own judgement as to the validity of my claim. Therefore, if I claim that Julia’s story of ‘no pet’ covenants is one of suffering I need to convince my reader of the validity of that knowledge claim by the transparent communication of my supporting evidence and argument. I do this by means of presenting “*thick descriptions*” (Nowell *et al*, 2017, p. 3) using the participant’s own words in my analysis chapter together with a detailed description of my interpretation of that evidence and, in Julia’s case, her own feedback on my interpretation. This allows the reader to retrace the steps in my argument to judge the plausibility of my interpretation. The use of extensive quotes and detailed descriptions of interpretations and auditable decision trails is vital for ensuring the quality of my research but is difficult to reconcile with restrictive word limits for publications (Bell, 2002) and doctoral theses. Consequently, I have found it challenging to keep within the indicative word limit for my thesis.

The validity of my research focuses on the ‘trustworthiness’ of my analysis which requires that I

“render transparent the process by which the interpretation of the narrative and stories have been reached” (Earthy and Cronin, 2008, p. 21.4).

Lincoln and Guba (1985) introduced four practical criteria for establishing ‘trustworthiness’ in qualitative research: credibility, transferability, dependability and confirmability. Table 5 addresses the quality of my research by demonstrating how it meets Lincoln and Guba’s trustworthiness criteria. More recently, Tracy (2010) proposed a more expansive model

using eight criteria to evaluate quality: worthy topic, rich rigour, sincerity, credibility, resonance, significant contribution, ethics and meaningful coherence. However, I chose to use the original Lincoln and Guba concept of trustworthiness because it is

“widely accepted, and easily recognized criteria” (Nowell *et al*, 2017, p. 3).

Table 5 - The quality of my research based on Lincoln and Guba's trustworthiness criteria

Trustworthiness criteria	Explanation of the criteria	Evidence of my research addressing the criteria
Credibility	The 'fit' between the participant's views and the researcher's representation of those views (Tobin and Begley, 2004).	<p>Prolonged engagement with the interview data over the course of more than a year.</p> <p>Triangulation of different data collection modes (interview transcripts; reflexive journal entries; public domain sources such as newspapers and websites; primary sources of law; existing research from my literature review) (Nowell et al, 2017).</p> <p>Participant engagement with my interpretations. I sent the narrative I crafted to each of the relevant participants for their feedback and in three cases we met in person to discuss my analysis and where necessary I amended my interpretations in the light of their comments.</p>
Transferability	<i>'The generalizability of inquiry'</i> (Nowell et al, 2017) that allows for the findings to be transferred to other areas.	In my data analysis chapter I provide <i>"thick descriptions, so that those who seek to transfer the findings to their own site can judge transferability"</i> (Nowell et al, 2017:3).
Dependability	The research process is logical, traceable, and clearly documented (Tobin and Begley, 2004), for example, by providing an audit trail which provides evidence of the decisions and choices made by the researcher.	I have kept records of the audio interview data, interview transcripts, a reflexive journal recording observations immediately after the interviews and at other contact points, an audit trail of code generation, notes and mind maps about my decisions for linking codes and hierarchies of themes.
Confirmability	The researcher's findings are clearly derived from the data. This is established when the other three criteria are met.	I have explained my reasons for theoretical, methodological and analytical choices throughout the research so others can understand why I made the decisions I did (Koch, 1994).

Reflexivity is a central component to the decision audit trail (Nowell *et al*, 2017; Lincoln and Guba, 1985) and my reflexive journal helped me to document the rationales for my decisions as well as recording personal reflections of my thoughts and values as data collection and analysis progressed and my ideas crystallised. I also used my reflexive journal to make mind maps and diagrams to make sense of theme connections and develop hierarchies of themes (Nowell *et al*, 2017) (*Figure 6 – examples of mind maps in my reflexive journal*).

3.10 Limitations of my empirical research

A limitation of my empirical research is that I only interviewed pet-owning tenants who were adversely affected by ‘no pet’ covenants and not landlords who benefit from the covenants. Therefore, my findings only provide an understanding of one aspect of the wider debate on the regulation of ‘no pet’ covenants. My empirical research is best viewed as a pilot study for a more comprehensive study to follow that will recruit research participants from all the relevant stakeholders affected by any legislation to regulate the use of ‘no pet’ covenants.

A further limitation of my empirical work comes from the fact that I only had seven research participants and only four of these provided data suitable for narrative analysis. This is a small number of participants for a thematic content analysis study, although such small numbers is more common for studies using narrative analysis. For example, Thomas *et al* (2018) used only four case studies in their narrative study and responded to concerns about the low number by observing that,

“it is in the nature of narrative analysis that individual cases are explored in detail, and therefore, we concentrate on data depth rather than data breadth” (2018, p. 957).

It is one of the strengths of my narrative analysis that it provides an in-depth understanding of the participant’s experiences of the human-companion animal relationship and ‘no pet’ covenants. This is only possible when exploring individual cases in such detail. The number of research participants I recruited was not governed by any pre-determined figure. Instead, I was receptive to the data which I started analysing as soon as I had transcribed each interview. It was clear that data saturation occurred at an early stage of analysis, meaning no new themes arose in the later interviews, and therefore I chose not to interview any more pet-owning tenants. Early data saturation can occur where, as here, there is a high level of homogeneity amongst the research population (Guest, Bunce and Johnson, 2006) as discussed in section 3.6 above. However, reliance on such a small sample can make it difficult to extrapolate the findings more widely. My empirical research therefore provides a valuable exploratory pilot study pathing the way for a larger study to follow.

3.11 Conclusion

In this component of my portfolio, I have explained the theoretical underpinning of my research design and process. As a social constructionist, I am interested in understanding the social world of pet-owning tenants through their experience, the meanings they attribute to those experiences and the relationships through which those meanings arise. For this, I need to adopt a qualitative approach; one that gives the participants freedom to explain their experiences in their own words, to “*let the tellers have their say*” (Irvine, 2013a, p. 6) hence my use of unstructured and semi-structured in-depth interviews. Giving pet-owning tenants an opportunity to explain in their own words the nature of their relationship with their companion animal and the effect of ‘no pet’ covenants on their lives is a valuable step in my socio-legal research to assess the continued use of these covenants.

4 PORTFOLIO COMPONENT 3 - Ethics

4.1 Ethics process and documentation

Initially approval was sought from the University Ethics Committee for my research relating to pet custody disputes and this was granted on 17 January 2017. Full ethical clearance was granted in accordance with ethical guidelines of Northumbria University which adheres to the SLISA Statement of Principles and the British Psychological Society. When successfully operationalised, as was the case with my research, these practices aid the gathering of more reliable and valid data. In August 2017 I applied for permission to interview pet-owning tenants so that I could interview Bob Harvey with a view to doing post-doctoral research (a copy of the application form is below). This demonstrates that my research on 'no pet' covenants came within the Amber category (now known as the medium ethical risk category) because it involves collecting personal data from non-vulnerable adults. Shortly after this I decided to change my DLaw topic from pet custody disputes to 'no pet' covenants and I sought an amendment to my application. This was approved on 9 November 2017.

4.1.1 Informed consent

The research was conducted in line with the research ethics policies of Northumbria University. All participants were given a Research Information Sheet (RIS), which included a consent form, (a copy is provided below) at the start of the interview and I talked through the contents of the document, which we both signed, before turning on the audio recording device. The RIS outlines the purpose of the research, the role of the participant, what will happen to the data and the opportunity for the participant to change his/her mind or complain. This is important to ensure informed consent (Silverman, 2017) by providing adequate and appropriate information about the research. No coercion or undue influence was exercised over the research participants. I even waited until the participant who was a law student had graduated before asking her to participate to make sure she felt no undue influence to participate due to our relationship as lecturer/student. All my participants were adults so no concerns over capacity or competence arose. With the exception of one participant, anonymity was assured and maintained. Bob's story was already in the public domain having been reported on the BBC news and on social media sites and he was happy for me to use his real name.

4.1.2 Data protection and storage

My research involved collecting personal data from living individuals and therefore I complied with duties under the General Data Protection Regulation by only using the data for

the purposes set out in the RIS and taking appropriate measures to store personal data confidentially. Where personal data is held on a computer, it is password protected to make sure only I can access the documents. I always 'lock' the computer when I leave the office. Any hard copy records such as paper documents are stored in a secure place - a lockable drawer in my office to prevent unauthorised access. The interview data will be retained for 3 years following completion of the professional doctorate or relevant publication whichever is the latter and will then be destroyed.

4.1.3 My Northumbria University Ethics application form (2017)

Research Proposal Form for AMBER projects

Depending on your research study, you may need to include supporting documentary evidence as part of this form. Please refer to the University Research Ethics and Governance handbook, or those provided by your Faculty or Service Department for information about the type of evidence you need to provide.

Project title:	Pets in Housing - the social construction of cats and dogs as pets and the implications for housing law/policies
-----------------------	--

Submitter information

Name: Debbie Rook

Status: ☒ Staff ☒ PG research ☐ PG taught ☐ Undergraduate

Faculty: BL

Department: Law

Email: debbie.rook@northumbria.ac.uk

Principal Supervisor (if relevant): Ray Arthur

Please list your co-investigators:

None

Data Source

Tick all relevant boxes that apply to your proposed research and then make sure that you also complete **all** of the relevant sections.

1. People and/or personal data of a living individual

☒

Participants are defined as including living human beings. This also includes human data and records (such as but not restricted to medical, genetic, financial, personnel, criminal or administrative records including scholastic achievements). Personal data is defined as any identifiable information that affects a person's privacy such as information which is biographical in a significant sense or has the relevant individual as its focus rather than some other person or some transaction or event. This includes video/audio and photographic materials.

PLEASE COMPLETE SECTIONS: 1, 6, 7, 8, 9

2. Secondary data (not in public domain)

☐

Secondary data involves the use of existing data (not in the public domain) with the permission of the Data Controller for purposes other than those for which they were originally collected. Secondary data may be obtained from many sources, including surveys, computer databases and information systems.

PLEASE COMPLETE SECTIONS: 2, 6, 7, 8, 9

3. Environmental Data

☐

Any outdoor fieldwork in rural, coastal, marine or urban environments and the temporary or long term effects the research study may have on people, animals or the natural or built environment.

4. Commercially sensitive information

☐

1. PEOPLE AND/OR PERSONAL DATA

If you are involving human participants, or are gathering personal data about a living individual then please complete all of the sub-sections in section 1.

A: RESEARCH AIMS

State your research aims/questions (maximum 500 words). This should provide the theoretical context within which the work is placed, and should include an evidence-based background, justification for the research, and clearly stated hypotheses (if appropriate):

This research is being undertaken at the same time as my Professional Doctorate in Law and is likely to have relevance to it.

My research will examine the following questions:

1. *How pet owners construct stories about their relationship with their pet dog/cat?*
2. *How pet owners feel about housing law/policies that fail to take their relationship with their pet into account*

I am defining my research problem using a Constructionist model of reality. I am more drawn to a Constructionist model than a Naturalist model which views reality as a substantive truth. The Naturalist model assumes that interview responses are giving direct access to a person's experiences and feelings which are taken to be inside their heads, whereas the Constructionist model sees the interview responses as "*actively constructed 'narratives' involving activities which themselves demand analysis*" (Holstein & Gubrium, 1995). This means that I'll be examining "*the active 'work' that interviewees do in producing their answers.*" (Silverman, 2013).

B: STUDY DESIGN AND DATA ANALYSIS

Please provide a description of the study design, methodology (e.g. quantitative, qualitative), the sampling strategy, methods of data collection (e.g. survey, interview, experiment, observation), and analysis

I will be using unstructured and semi-structured interviews with a small number of people.

The method of enquiry best suited to answer my questions is interviews to gather rich data on people's meanings and experiences. I want to understand the personal meanings people give to the relationship with their pet and not to rely on predetermined definitions of my own.

Therefore, I need to use unstructured interviews to give the person a lot of freedom to talk about their relationship with their pet in their own terms. Unstructured interviews fit with my

epistemological position that a legitimate way to generate data is to talk interactively with people and to analyse their use of language. My view is that knowledge is situational and contextual. My epistemological position, that interviews are social interactions between the interviewee and researcher, means that having a set of standardised questions as a way to control bias, is inappropriate as bias cannot be controlled or eradicated. It is better to understand the complexities of the interaction. I plan to open the interview with an open-ended request e.g., "tell me the story of your dog?"

I will be using a narrative analysis of the data. Narratives give meanings from the perspective of the people involved and are inherently social. Narrative research gives voice to the unheard and is particularly useful for marginalised social groups. Pet owners, who develop a strong relationship with their pet, are not necessarily a marginalised social group but may nevertheless feel that others don't appreciate the strength of the relationship they have with their pet and therefore trivialise it

I am considering employing respondent validation techniques to check my findings by taking the interpretations and/or transcripts back to the interviewees for their comments.

Ci SAMPLE

Provide details of the sample groups that will be involved in the study and include details of their location (whether recruited in the UK or from abroad) and any organizational affiliation. For most research studies, this will cover: the number of sample groups; the size of each sample group; the criteria that will be used to select the sample group(s) (e.g. gender, age, sexuality, health conditions). If this is a pilot study and the composition of the sample has not yet been confirmed, please provide as many details as possible.

I will be interviewing a relatively small sample of participants who are pet owners but have encountered problems with obtaining or retaining housing due to their having a pet.

I already have one person willing to be interviewed. An 87-year-old man who is threatened with eviction from his care home because he won't give up his 10-year-old dog. I am keen to interview him over the summer 2017.

Cii If you will be including personal data of living individuals, please specify the nature of this data, and (if appropriate) include details of the relevant individuals who have provided permission to utilise this data, upload evidence of these permissions in the supporting documentation section.

Ciii. RECRUITMENT

Describe the step by step process of how you will contact and recruit your research sample and name any organisations or groups that will be approached. Your recruitment strategy must be appropriate to the research study and the sensitivity of the subject area. You must have received written permission from any organizations or groups before you begin recruiting participants. Copies of draft requests for organizational consent must be included in the 'Supporting Documentary Evidence'. You must also provide copies of any recruitment emails/posters that will be used in your study.

I will recruit members of the public using social media and press releases.

Will you make any payment or remuneration to participants?

☐

Yes

☒

No

If yes: Please provide details/justifications. Note that your Faculty may have specific guidelines on participant payments/payment rates etc and you should consult these where appropriate:

D. CONSENT

Please indicate the type of consent that will be used in this study:

☒

Informed consent

Please include copies of information sheets and consent forms in the 'Supporting Documentary Evidence'. If you are using alternative formats to provide information and /or record consent (e.g. images, video or audio recording), provide brief details and outline the justification for this approach and the uses to which it will be put:

☐

If using an alternative consent model (e.g. for ethnographic research)

Provide a rationale that explains why informed consent is not appropriate for this research study and detail the alternative consent arrangements that will be put in place. Add any relevant supporting documentation to the 'Supporting Documentary Evidence' section.

E. RISK

Please identify any risks associated with your project and how these risks will be managed. If appropriate refer to any Risk Assessments (RA) you have consulted to ensure the safety of the research team and your participants. Please state the level of risk for each RA.

I will be undertaking one-to-one interviews with members of the public who I do not know. I will therefore arrange to meet with them at the University or at a public place such as a café or in the presence of a third party.

F. TASKS AND ACTIVITIES FOR RESEARCH PARTICIPANTS

- I. Provide a detailed description of what the participants will be asked to do for the research study, including details about the process of data collection (e.g. completing how many interviews / assessments, when, for how long, with whom). Add any

relevant documentation to the 'Supporting Documentary Evidence' section of this form.

I will interview the participants in person. The length of the interview will be determined by the participant but I anticipate up to 2 hours.

- II. Provide full details of all materials that will be used (including consent documentation). If you are using newly developed or unpublished materials these must be provided as Supporting Documentary Evidence

Research Information sheet and Informed Consent form (copies are provided in the supporting documentary evidence)

- III. If the task could cause any discomfort or distress to participants (physical, psychological or emotional) describe the measures that will be put in place to reduce any distress or discomfort. Please give details of the support that will be available for any participants who become distressed during their involvement with the study.

There is a possibility that the participant may become upset or angry as they tell their story of what happened. I will be empathic and supportive in my responses wherever possible. I have experience of supporting upset clients at a foodbank where I volunteer. If the participants become upset they will be given the option of a break (and a cup of tea) or postponing/terminating the interview.

2. DATA FROM SECONDARY SOURCES

If your research will be using data from secondary sources (i.e. data about people that has not been gathered by you from the research sample and which is not in the public domain) then the following sections must be completed.

A. DATA SOURCE

What is the source of your data?

Describe any measures that will be put in place to meet the supplier's terms and conditions. (Note: arrangements about anonymising data, data storage and security should be provided in section 6). Where permissions are required to access data, provide evidence of the relevant permissions you have obtained in the supporting documentary evidence.

If your research involves the cooperation of external organizations then relevant permission should be provided in the 'Supporting Evidence Section'.

3. ENVIRONMENTAL DATA

If your research study involves taking samples from the urban or natural environment (e.g. (soil, water, vegetation, invertebrates, geological samples etc) all of the questions in this section must be completed.

A. SITE INFORMATION

List the locations where the data collection will take place including, where appropriate, the map reference. State if the location is protected by legislation (e.g. Area of Outstanding Natural Beauty (AONB), Site of Special Scientific Interest (SSSI), National Park etc).

B. PERMISSION AND ACCESS

Do you need permission to include the location(s) in the research study or to gain access to the site(s)?

☐

Yes

☐

No

If yes: State the job title and contact details (address and telephone number) of the person you will contact to request permission. If you have already received permission, please include a copy of the letter or email confirming access under 'Supporting Documentary Evidence'.

C. SAMPLES

Provide details of: the type of sample(s) you will collect (soil, water, vegetation, invertebrates etc); the size of each sample; and the spread of sampling across the location(s). Explain how the samples will be disposed of after the research is complete

Briefly explain why collecting the sample(s) is essential to the research study.

D. COLLECTION

Describe how you will reach the site and any potential pollution, noise, erosion or damage that could occur. Detail the measures you will take to reduce any impacts.

Detail any impacts caused by extracting the sample (e.g. disturbance of animal or bird populations; use and disposal of chemicals in the field; trampling or removal of vegetation; visual or aesthetic impacts caused by markers left on the site). Detail the measures you will take to reduce any impacts.

4. Commercially sensitive data

5. Data security and storage

A. ANONYMISING DATA

Describe the arrangements for anonymising data and if not appropriate explain why this is and how it is covered in the informed consent obtained.

Each participant (and their pets) will be given a pseudonym in the dissertation and any publications/presentations. Addresses will not be published.

B. STORAGE

Describe the arrangements for the secure transport and storage of data collected and used during the study. This should include reference to 'clouds', USB sticks.

Where personal data is held on a computer, there will be a password applied to that computer to make sure that only the researcher can access the documents. I will also lock my PC when leaving the room by pressing "Ctrl, Alt and Delete" and selecting "Lock Computer".
Hard copy records such as paper documents, tapes, photographs or removable media (memory sticks etc) will be stored and indexed in appropriate secure containers such as lockable filing cabinets or drawers to prevent unauthorised access.

C. RETENTION AND DISPOSAL

Describe the arrangements for the secure retention and disposal of data when the research study is complete.

The interview data will be retained for 3 years following completion of the professional doctorate or relevant publication whichever is the latter and will then be destroyed.

6. Intellectual property

Please provide details of any Intellectual Property issues or commercial implications arising from the proposed study. Please describe the agreements that are in place to protect / exploit the Intellectual Property.

None

7. Timescale

Each par

Proposed start date of data collection: 01/05/2017

Proposed end date of data collection: 01/01/2019

8. Supplementary information

Please tick the boxes that relate to the supplementary documentation that you will attach as part of your submission:

- ☒ Participant information sheet
- ☒ Consent form(s)
- ☐ Debrief sheet
- ☐ Participant recruitment email/poster
- ☐ Unpublished (in-house) questionnaire(s)
- ☐ Interview / observation / focus group schedules
- ☐ Risk Assessments / Standard Operating procedures
- ☐ Permission letters (e.g. from school, organization, team etc)
- ☐ Other documents. Please specify below:

4.1.4 Research information sheet

Pets and housing

This research is being carried out by Debbie Rook, a Principal lecturer at Northumbria University, School of Law, as part of her Professional Doctorate. The data gathered from the interviews will be used by Debbie in her doctoral thesis and will also be used in any conferences and publications in which Debbie discusses her doctoral research.

This sheet tells you all about the research. You are invited to take part in the research and this sheet helps answer questions you might have about it. Once you've read the sheet, or talked about it with Debbie, you can decide whether you'd like to take part or not.

What are you trying to find out?

I am researching pets and housing and specifically examining the effect of 'no pet' covenants in residential leases. I'm interested in investigating pet owners' experience of having a 'no pet' covenant in their lease. For example, being in fear of, or threatened with, eviction or having to give up pets in order to move into rental property. The relationship a person has with their pet is an essential aspect of this research and I'm interested in finding out how owners view their pet.

What will happen as part of the research?

I would like to interview people who have experience of a dispute or difficulty arising from a 'no pet' covenant/policy in their lease. I am interested in hearing their story about their relationship with their pet and their experience of trying to resolve the dispute and the effect it had on them.

Why do you want me to take part?

I would like to hear from you because you have been affected by a 'no pet' covenant in a residential lease or have been involved in a dispute with a landowner arising from your relationship with your pet.

What if I don't want to take part?

You don't have to take part in the research. Just tell me that you're not interested. It's up to you whether or not you take part in the research.

What if I change my mind?

If you change your mind about taking part, that's OK. You might have started off wanting to talk to me, but you don't now. Or perhaps first of all you didn't want to talk to me, but now you do. It is fine, just let me know.

You said you're going to take notes/record the interview. Will you write down things that I say?

Yes, I will be audio recording the interviews and I will also write down things that you say about your experiences and how you're feeling. This is because I think that it's useful and interesting and that it will help me write my doctoral dissertation. I won't use your name in the thesis or in any subsequent publications.

I will also take a copy of the photograph of your pet (if you're happy for me to do so).

If you change your mind and decide you no longer wish to be involved, we can discuss whether any material produced using your information will be immediately destroyed or can be relied upon by the research. It will depend on how integrated your material is in the research. If you change your mind shortly after the interview, so that the material is not incorporated into the thesis, it can be easily destroyed. However, if you change your mind some time after the interview and the material is integrated into the doctoral thesis and can't be easily extracted, the material will still be used in the research in its anonymised form.

Will anyone know I've taken part in the research?

The research project involves interviewing a small number of people and looking in detail at their narratives. Each participant (and their pets) will be given a pseudonym in the dissertation and any publications/presentations. Addresses will not be published. However, some personal data may be included at a general level such as male/female, age group, occupation type and there may be some more specific details such as length of time of owning the pet that will be included.

How do I know that you're going to keep my information safely?

Where personal data is held on a computer, there will be a password applied to that computer to make sure that only the researcher can access the documents. I will also lock my PC when leaving the room by pressing "Ctrl, Alt and Delete" and selecting "Lock Computer".

Hard copy records such as paper documents, tapes, photographs or removable media (memory sticks etc) will be stored and indexed in appropriate secure containers such as lockable filing cabinets or drawers to prevent unauthorised access.

The interview data will be retained for 3 years following completion of my professional doctorate and will then be destroyed.

What's going to happen after you've done all this research?

The interviews will be used by me to write my doctoral thesis. I may also use extracts from the interview transcripts and/or findings from the interview data at academic conferences and/or include it in publications such as journal articles.

OK, I think I want to take part

On the next page there's a consent form to sign.

You should keep this information sheet, just in case you have any questions.

I want to know more about the research

You can ask Debbie whenever you see her about the research. She will be happy to answer your questions. You can also contact her at debbie.rook@northumbria.ac.uk.

I want to complain about the research or report something about the research I'm unhappy with

You should tell Debbie if there's something you're not happy with. If you're not happy to do that, please tell her Doctoral supervisor, Ray Arthur. You can contact Ray at Northumbria Law School at raymond.arthur@northumbria.ac.uk.

Research Consent Form (participant)

Name of project

Pets and housing

Organisation supporting the doctoral research

Northumbria Law School, Northumbria University

Researcher's name

Debbie Rook

Participant's name – write your name in here

- I confirm that I have been supplied with and have read and understood an Information Sheet for the research project and have had time to decide whether or not I want to participate.
- I understand that my taking part is voluntary and that I am free to withdraw at any time, without giving a reason.
- I agree with Northumbria University recording and processing this information about me.
- I understand that this information will only be used for the purposes set out in the information sheet.
- I agree to copies of the photographs being taken by Debbie and used for the purposes set out in the information sheet.
- I have been told that any data generated by the research will be securely managed and disposed of in accordance with Northumbria University's guidelines.
- I am aware that all recordings will remain confidential with only the research team having access to them.
- My consent is conditional upon the University complying with its duties and obligations under the General Data Protection Regulation.

Signature of Participant

Date

I can confirm that I have explained the nature of the research to the above named participant and have given adequate time to answer any questions concerning it.

Signature of Researcher

Date

4.2 Ethical considerations arising during the research

Bell recognises that there are serious ethical concerns with narrative inquiry because researchers take the participant's personal story and impose meanings on it and

"the effects of this imposed re-storying can be powerful" (2002, p. 210).

I was sensitive to this in my crafting of the four narratives and tried to stay as close to the participant's own words as possible. I also encouraged them in face-to-face conversations to give me honest, critical feedback on my analysis so they did not feel bound by my interpretations of their lives. I did not feel the need to negotiate an exit from the relationship with the three participants (Bob, Kate and Julia) with whom I had developed a relationship because I am happy to continue the friendship in each case. Shir-Vertesh (2012) talks of long-term connections and lasting friendships being formed during her research on pet owners. This avoids the ethical dilemma identified by Josselson of the need of

"withdrawing gradually and gracefully in a way that leaves the participants feeling honoured and not exploited" (2007, p. 545).

Given the subject matter of the interviews, and the fact that some of the participants risked losing their companion animals or their homes, it was important that I was sensitive to the emotional needs of my participants. Two of them (Bob and Julia) cried during the interviews and I drew on my training and experience as a volunteer working with homeless people to be a sympathetic listener and give supportive responses. I followed up Julia's interview by emailing her details of the Blue Cross Pet Bereavement service and encouraged her to contact them.

5 PORTFOLIO COMPONENT 4 - Analysis of Interviews

5.1 Introduction

This component of my portfolio consists of two sections: section 1 contains the findings of the thematic content analysis of the interview data from all seven of my research participants and section 2 contains the narrative analysis from the four narratives I crafted from the interviews of four of my participants.

Section 1 is broken down into two parts: Part I analyses how humans construct companion animals as family members in everyday practices. It seeks to answer my research question 1 ('How do people in the UK construct companion animals as family members in everyday practices?'). There are a small number of existing research studies and these are analysed in the light of my research which builds on their findings. Part II of Section 1 analyses how people experience a 'no pet' covenant in their residential lease and the strategies they devise to deal with its adverse effect on their lives. It seeks to answer my research questions 2 and 3 ('What do the stories of pet-owning tenants in the UK reveal about their lived experience of 'no pet' covenants?' and 'How can the insights from these stories develop and enhance a deeper understanding of the harm 'no pet' covenants cause to tenants and companion animals?'). There is very little published academic literature on the use and effect of 'no pet' covenants especially in the UK, but I refer to the few articles that exist and explain how my research builds on the existing literature to provide an original contribution.

In Section 2, I adopt a narrative approach to analyse four of my interviews in greater depth. Narrative analysis takes a holistic approach and keeps the story intact enabling researchers to understand complexity, detail and context. Temporality of experience and meaning is examined, acknowledging the way in which meanings may change over time. My purpose in section 2 is to address my research questions 1-3 by uncovering additional findings that were not evident from the thematic content analysis.

One of the ways in which my research is original is how it views the assemblage of human+animal+home+lease as the relevant subject for analysis (Michael, 2000) thereby questioning the research participants on both the role of companion animals in family practices *and* the effect of 'no pet' covenants. None of the existing empirical studies have done this. My approach allows for the acquisition of a deeper and more insightful understanding of the tenant's lived experience of 'no pet' covenants.

5.2 Section 1, Part I Thematic Content Analysis- How people in the UK construct companion animals as family members in everyday practices

There is extensive research to show that many people consider their companion animals as family members (Cain, 1983; Fox, 2006; Franklin, 2006; Charles and Davies, 2008; Power, 2008; Shir-Vertesh, 2012; Irvine and Cilia, 2017). My research builds on the existing empirical research on 'pets as family' from Britain (Fox, 2006), Australia (Power, 2008) and Israel (Shir-Vertesh, 2012) to consider the continued relevancy of the themes identified in these studies and to identify any further themes.

5.2.1 Conceptualising pets as family members

Section 1.6 of the commentary critically analysed the question of companion dogs and cats being recognised as family members within the disciplines of sociology and law. A number of studies have found similarities between the human-companion animal relationship and the parent-child relationship (Beck and Katcher, 1996; Serpell, 1996; Paul, 2000) and Power devised a 'Parent-Child' model in the context of her research on the human-dog dyad. It has been observed that,

"Pets are usually not just any member of the family, however. They are children"
(Beck and Katcher, 1996, p. 41).

Shir-Vertesh's (2012) focus on a parent-child model needs to be understood in the context of her research participants (all young, Jewish couples from a relatively affluent and educated part of Israel that is very family orientated). My research participants comprise a very different population, generally older. Nevertheless, Shir-Vertesh's categories of "*prechild*" and "*child substitute*" are relevant to some of my participants (2012, pp.423-424).

Emma (in her mid-40's) and was not able to have children. Her relationship with her dog, Anton, appears to correlate to Shir-Vertesh's child substitute model,

"Not all of us can have children, you know and that's a way of our maternal instinct you know to show our motherly side and our motherly love if you can't have children and just because I can't have children why shouldn't I have something in my life that will let me still be motherly".

She goes on to say she and her partner call Anton their "son".

Isabel (a student in her 20's) sees her two cats as her children

"Now, I spend most of the day at home and being with them feels like being a mum. They are both so ... sweet that it's like having two lovely toddlers around".

When Kate (in her 30's) talks about her and her husband's decision to get a dog, she refers to the seriousness of the decision and compared it to having a baby

“It wasn’t a decision we took lightly, you know. It was as serious a decision in my opinion as having another baby”.

Later she made a clear reference to the parent-child model in relation to their two dogs

“We just thought of them as extra kids”.

Lucy (in her 20’s) also described her relationship with their cat, Simba, in parent-child terms

“he’s my baby [laughs]”.

It is clear that Emma, Isabel, Kate and Lucy all see the relationship they share with their companion animal as a family member, but significantly, it is couched in terms of a parent-child relationship which is consistent with existing research (discussed in section 1.6.3). Parent-child relationships are usually perceived as very close bonds grounded in concepts of dependency, vulnerability and relations of care (Power, 2008).

Not all of my participants fitted the parent-child model. David (a homeless man in his 30’s) refers to his dog, Mack, as his family but does not specify the nature of the family relationship.

“Researcher - Have you got family that you see?”

David – Yeah, Mack.

Researcher – Have you got human family that you see?”

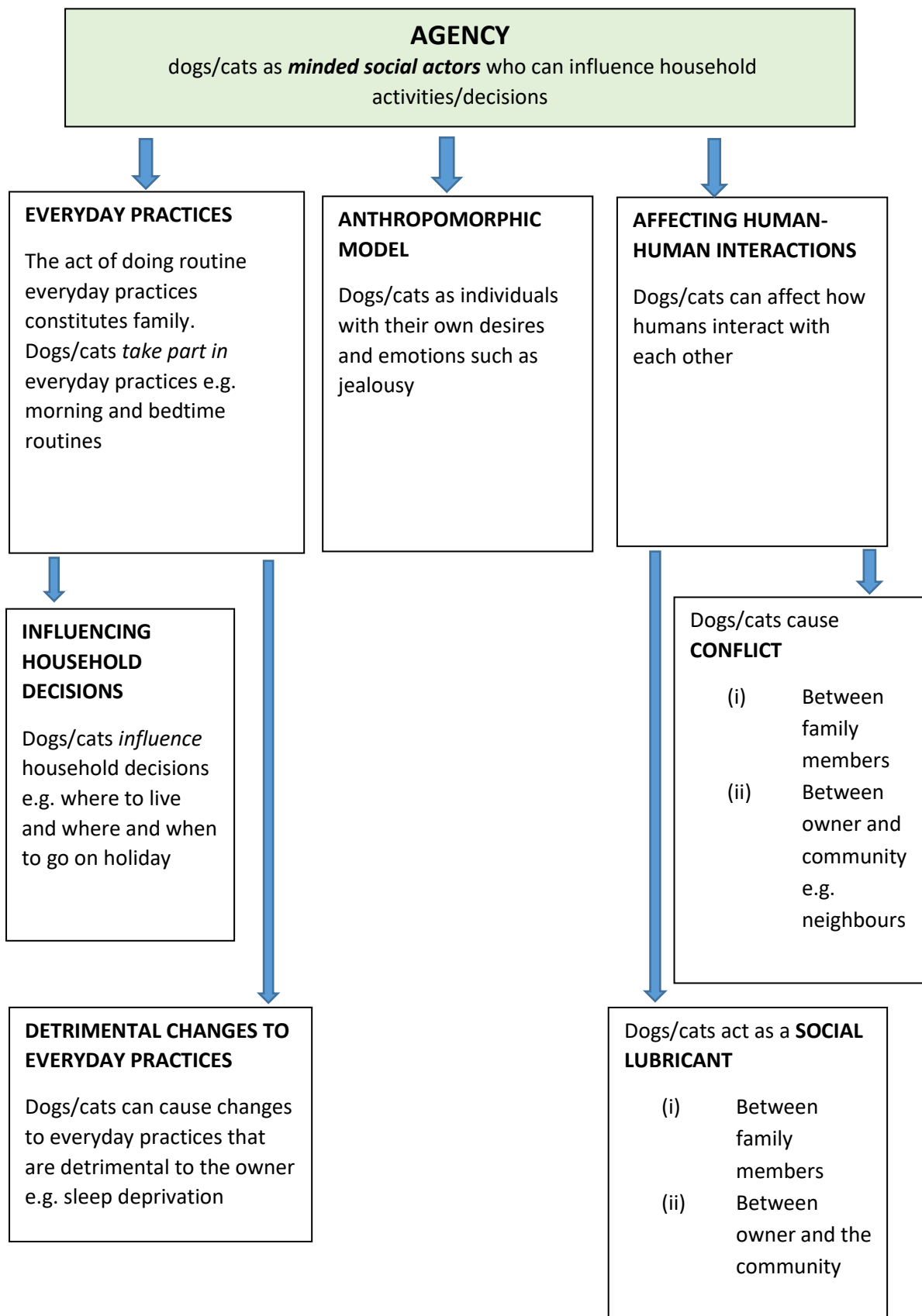
David – Yeah, Mack”.

Existing research demonstrates the strong bond that can develop between a homeless person and their companion animal (Irvine, 2013a; Carr, 2016) and it is clear that David sees Mack as equivalent to human family. David does not mention any other family members throughout the interview.

Section 1.3 of the commentary identified the problems of my using the term ‘family’ which is heavily laden with human associations. Power (2008) found that ‘family’ served as an “umbrella term” capturing a diverse range of human-dog relations including hierarchical relations (2008, p. 540). Some of my participants were reluctant to use family terminology in describing their relationship with their companion animal. Bob and Julia (both retired and in their 80’s and 60’s respectively) and Josh (in his 20’s) described the animal as being a ‘companion’ or ‘friend’ rather than a family member. However, it appears that the label used to describe the relationship does not always reflect a difference. For example, Lucy refers to Simba as her “baby” while Josh calls Simba his “companion” but analysing the reality of the relationship suggests that Josh may have a closer bond to Simba. Josh was the original owner, relies on Simba for emotional support and generally spends more time with him. Similarly, Bob and Julia both have very close bonds with their dogs, and as will be discussed later, there is evidence that the relationship exists in practice as akin to human family.

Having identified that many of my research participants perceive their pets as family members, I seek to address my research question 1 to examine *how* people in the UK construct companion animals as family. I identified three key themes from the existing research: Agency - Minded Social Actors (Fox, 2006; Power, 2008); Social Support and Health (Irvine, 2013a; 2013b); Ambivalence (Shir-Vertesh, 2012; Irvine and Cilia, 2017). I found all three themes to have continued relevance in the UK and consequently they constitute part of my findings in this chapter. My first theme is Agency and *figure 7* illustrates the various sub-themes encapsulated within this overarching theme. The sub-theme 'Detrimental changes' arose directly from my interview data and is not considered in the existing literature. It proved to be especially significant in the context of 'no pet' covenants.

Figure 7 - AGENCY theme arising from research question 1: 'How do people in the UK construct companion animals as family members in everyday practices?'



5.2.2 First Theme – AGENCY: Everyday Practices

Power's (2008) research on the nature of the relationship between new dog owners and their dogs identified 'Agency' as a key theme and she deduced the 'Agency of the Animal' model recognising how family is shaped by the agency of the dog. My research takes Power's 'Dog Agency' theme and examines its relevance in the UK (Power's study was in Australia) to cats and dogs (Power's study was specific to dogs) and to long-established relationships (the participants in Power's study were all new dog owners).

Section 1.6.2 of the commentary explains how in theorising pets as family members, I draw on Morgan's concept of 'family practices' (2.5, My theoretical assumptions). For Morgan (1996; 1999; 2011) 'family practices' are concerned with the routine and trivial matters of everyday life such as eating, sleeping, leisure and intimacy. These practices are orientated to another family member and endorse their membership, showing "*the circularity between practices and membership*" (Morgan, 2011, p. 3.4). Therefore, these are not just activities that family members do; instead, the act of doing them constitutes family. I encouraged my participants to share stories about their daily routines involving their companion animals to explore ways of constructing pets as family members within these everyday routines. I found that early morning and late night routines largely revolved around companion animals. Both Bob and Julia are retired and live alone with their dogs and it was clear that their dogs actively influenced their everyday practices. It was not just the case of the dog fitting into a pre-existing routine; the dogs actively shaped Bob and Julia's routines:

"First thing in the morning you get out of bed, take Annie out, especially being in a flat and then a few hours had passed you know, take her for a walk ... so my day would end usually about 10 o'clock I'd take her out for the last time" (Interview with Julia).

"He'll give me a bark in the morning wanting out, so I'll get up, I'll let him out, and he'll come back to bed and sometimes I lift him up and err, he'll lie awhile and then he'll go down to the back of my leg and lie and err we'll get up say mebbe 9 o'clock or whatever and I'll have me breakfast and err I'll let him out again" (Interview with Bob).

Even in a busy young family, the dogs made their own mark on the everyday routine ensuring Kate or her husband went for a long walk each day,

"...either myself or my husband would get up first thing in the morning. Roxie was incredibly lazy and she just wouldn't budge. She would just stay in her bed and look at you and groan and go back to sleep. Honey would be standing ... in the kitchen tail wagging, you know, dancing because she would need to go outside for the toilet. Let them out, leave the back door open, do all the breakfasts ready for school, whatever, then one of us would take [daughter] to school and then typically about 10 o'clock or so usually [husband] would take them out for their walk and they'd be away for sometimes an hour and a half, two hours".

While cats do not need to be walked every day, they are just as capable of asserting themselves on their owner's everyday routines. Lucy and Josh's young cat, Simba, ensures

he is given affection, food and play as soon as they wake up each morning. Meeting Simba's needs has become a part of their everyday morning routine. Josh observes

"I switch the alarm off and then he runs straight in. He's onto the bed, we stroke him ... for about 10 mins and it's either we'll get up or he'll get fed up and want some food so I'll get up I'll do what I need to - brush teeth, toilet, get some clothes on, I'll come in, I'll feed him, he'll be around my legs, he'll be meowing away mainly fishing for snacks because he likes Dreamies ... if I've played with him a little bit I'll start getting ready for work he'll go in and watch Lucy like put make up on, and sort her hair out and he'll clean while she's doing that which I think is kind of cute".

Emma's dog, Anton, is a big part of her home life. Outside of work, she spends all her time with him. She describes the routine of a typical workday, which includes waking up early to walk Anton before work and leaving work promptly to rush home to Anton,

"We get up very early, we have a long walk, I go to work ... I come home and take him out again and then we settle in ... he'll eat, I always have to put a little bit of cheese on his food for him to eat it. He loves cheese and then we'll settle down watch a bit of TV".

Morgan (2011) shows how sleeping arrangements in the home both constitute, and derive from, notions of family and proper conduct between family members. Since the 1950s, dogs kept as companion animals have moved from sleeping outside to inside the home (Franklin, 2006; Power 2008). This has resulted in new family practices of sleeping arrangements with pets. A national survey of pet owners in Australia found that over 50% allowed pets in their bedroom (the figure was higher for the elderly and single people) (Franklin, 2006). Franklin is keen to emphasise the significance of this finding,

"The symbolism of household space needs to be emphasized here. Bedrooms are largely highly private spaces, the inner sanctum of privatized societies" (2006, p. 145).

With adults, only a restricted group of intimates, principally family, have permission to use their bedrooms. The majority of my research participants gave their companion animal access to their bedroom at night and some animals slept on the bed with the owner. Emma did initially try to keep Anton off the bed but he kept sneaking on when she was asleep so she now allows him to stay,

"He does sleep with us though, he sleeps in the bed which is probably a bit naughty but you know [laughs]".

Lucy and Josh allow Simba to sleep anywhere he wants. He rarely sleeps on the bed with them at night-time but seems to join them sometimes in the early hours of the morning. They like it if he chooses to sleep on their bed: *"I'd love it if he slept on the bed with us"* (Lucy). Josh talked about when he and Simba first moved into Lucy's flat,

"I mean, when I first moved in Lucy went to Africa for three weeks and I was only here a week and every single night without fail I would go to bed he would come in and he would like sit around, I guess to say goodnight ... I would wake up about two-ish roughly and he would be hitting me in the face wanting me to move out of his spot or something like that and he would be with me until I woke up then".

Isabel's cats sleep on the bed with her and her partner. Marmite is

"a huge sleepy-head who spends the entire night lying next to me, his back against mine" and "Badger always sleeps at my feet (a strategic position for a toe-nibbler)".

When I asked Bob if Darkie slept on his bed he said

"Occasionally he does, aye, but he can't jump up. I have to lift him up cause I've a high bed, worse luck".

Darkie has his own dog bed on the floor of Bob's bedroom and usually sleeps there unless lifted onto Bob's bed.

Kate was the exception because her two dogs did not sleep in the bedroom. The dogs slept in a utility room downstairs where they had their own dog beds,

"it was quite dark and comfy and they had a big bed each so they would go in there and that was their space to chill out but they had the run of the house as well. They weren't confined to that area in any respect but they quite liked chilling out in there".

Kate admitted that this arrangement was because they had a small child at the time and had it just been her and her husband she would have allowed the dogs to sleep on their bed with them,

"They weren't allowed to sleep besides us just because if it had been me and my husband then probably it would have been fine but because [daughter] was still quite young and we just thought it would be better at night time to have us both and, with them being downstairs".

It is not just sleeping arrangements that are relevant to family practices. Access to home spaces, especially private spaces such as the bathroom, is significant (Franklin, 2006). Isabel's cat, Marmite is allowed to invade this highly private and personal space,

"He even gets into the bath-tub when I'm having a shower!"

Sitting together on a sofa watching TV or playing on the x-box is a shared family practice in many households. It is something that many of my participants share with their companion animals:

"I've literally put the world to rights watching TV and she'd just sit next to me on the settee and put her head on my lap" (Interview with Julia).

"I like to sit close to the tv while playing stuff. He'll jump on the back of the couch and he'll lie there" (Interview with Josh).

Talking about her evening routine with Anton, Emma said “*we’ll settle down watch a bit of TV and snuggle up*”. Anton has been excluded from the new sofa (in a bid to limit dog hair getting everywhere) but interestingly Emma now watches TV on the floor to be with Anton.

“Right now I’m sitting on the floor with him. He’s not allowed on the sofa but I end up sitting on the floor all night because of it so he can sit on my lap”.

This exclusion rule appears to be a practical solution to maintain the quality of the new sofa, rather than to assert hierarchical dominance over Anton.

A number of studies show that pet owners experience their companion animals as ‘minded social actors’ (Sanders, 1993) that can influence family and household decisions and activities (Fox, 2006; Power, 2008; Shir-Vertesh, 2012). These studies

“urge a re-thinking of human-animal family relations that is attentive to the everyday, embodied encounters between people and animals and suggest that animals may actively shape the ways that family and home are lived in the everyday” (Power, 2008, p. 537).

Isabel gives an example of Badger ‘asking’ to play a particular game,

“I spend a lot of time playing with him. He loves it when I run after him, like if I’m trying to hunt him, and calls for this game with a strange pigeon-like meowing”.

The cat knows its own mind and instigates playing the game it wants to play.

My findings show that just as in Australia (Power, 2008) and Israel (Shir-Vertesh, 2012) companion animals in the UK are social actors who actively shape everyday family practices in the home. Morgan (1999) identifies a number of agencies who play an important role in constructing family. One such agency is the social actors whose activities are involved with family. He takes a humanist stance and lists parents, spouses and children as the relevant social actors but subsequent research, including my findings, show that companion animals are also social actors that can influence family activities (Fox, 2006; Power, 2008; Shir-Vertesh, 2012). The themes of fluidity and change are key to Morgan’s family practices approach and he observes that,

“Notions of ‘family’ are rarely static but are constantly subjected to processes of negotiation and re-definition” (1999, p. 18).

As new research expands our knowledge and understanding of who influences family practices, Morgan’s category of social actors needs to expand to include companion animals.

5.2.2.1 Agency: Influencing household decisions

The perceived needs and preferences of companion animals are taken into account in decisions about everyday family activities such as holidays and day trips or more significant

decisions such as where to live thereby securing their place as influential social actors within the family (Franklin, 2006).

Josh explains how Simba is considered in any decisions relating to the house and household activities especially moving house but even something as basic as new furniture,

“Any major decisions I have always involve Simba ... Anything, anything that I have to make my mind up on it’ll always involve some sort of aspect for Simba even if it’s just something as small as getting something new for the place like how will Simba react to it? I am thinking about getting some book shelves for Lucy’s books ... I’m thinking as well how will it affect Simba? Will he jump on it? Will he pull that down? Is it going to be something he’s going to have an issue with? See, even small stuff like that”.

Earlier I considered how Lucy’s relationship with Simba comes within Power’s Parent-child model. In describing *how* Simba influences household decisions, such as moving house, Lucy compares him to a child,

“just like what you probably would with a child, if you’re moving with a child you think is there a good neighbourhood to bring a child up in. When we were moving and everything is there enough room for Simba?... If we wanted to let him outside can we let him outside?”

The context of this dialogue is significant. She was justifying her description of Simba as a family member, specifically as a child. For Lucy, Simba influences important household decisions, such as where to live, in the same way that a child does. For example, Simba influenced the size of the property they were moving to

“We literally got a spare bedroom in the new place because we thought if he wants to be away from us he can actually go there”.

Here Lucy demonstrates Fox’s *“animal instinct”* model (2006, p. 529). Simba’s perceived need to have his own space, possibly grounded in popular animal psychology of cats being solitary and independent animals, influences their decision to rent a larger property.

For many households, holidays are an important aspect of family life and it was clear that the companion animals influenced decisions about holidays for a number of my research participants. Kate observed that once they had dogs they changed their pattern for family holidays,

“We never took holidays or anything because we didn’t want to leave them with anyone”.

Prior to having dogs they took family holidays in Scotland and Ireland by combining a holiday with visiting family but after they got the dogs, they no longer did this. Instead, Kate took her daughter, Jess, to Ireland for two weeks to stay with her parents while Lewis stayed home with the dogs (reflexive journal entry, June 2019).

Isabel also referred to the problem of leaving the cats when going on holiday,

“If we go on holiday, we’re always worried about their wellbeing and hurry up to get back home as soon as possible”.

This was a similar concern for Josh and his cat Simba,

“Like I’m going on holiday in September is he going to be ok for the two weeks we’re away?”.

Both Bob and Emma said that they only ate at dog-friendly pubs and restaurants because they will not go for a meal without their dog. Thus even relatively small and trivial household decisions, such as, where to eat is influenced by the presence of the dog.

5.2.2.2 Agency: Detrimental Changes to Everyday Practices

Most of my research participants referred to detrimental changes in their everyday practices caused by their companion animal. It was evident that the participants generally played down the detrimental effect of these changes and accepted them as part of life with a dog/cat. This sub-theme emerged from the analysis of my interviews and provides a valuable insight into understanding *how* companion animals are constructed as family members in everyday practices. As social actors within the family household, companion animals can cause changes in routines that are detrimental to the people with whom they live but which are tolerated as an inevitable consequence of living with the animal. Interference with sleep and sleep deprivation was a recurrent example from my participants that illustrates this phenomenon.

Emma, Isabel, Julia, Bob, Lucy and Josh all referred to being woken in the early hours of the morning due to their pet snoring, meowing, playing or whining. Emma complained

“he’ll put his head on my neck and snore in my ear really loudly so while it’s very cute that he’s got his head resting on my jaw or my neck, being a Frenchie he does snore quite badly so that wakes me up”.

She justifies this disruption to her sleep by observing that sharing your bed with a human can be equally disruptive,

“but I don’t care I mean some things you get used to don’t you? Your partner can wake you up tossing and turning all night”.

Isabel complained of similar interruptions from her cat, Badger,

“He would spend every single night meowing non-stop for hours and we started to develop trouble sleeping. It literally felt like having an eternal, naughty new born at home”.

When talking about Simba causing interruptions to her sleep, Lucy observed

“I think I’m used to it if it happens once on a night. I’m used to it and I can fall back asleep but sometimes if it happens two or three times a night that’s when I, I do get a bit grouchy”.

For Julia the detrimental changes to sleep routines occurred as Annie got older and needed to go to the toilet more regularly which was difficult as they lived in a first floor flat. She explained,

“because she was a very clean dog right to the end if she woke me in the middle of the night I got up, got dressed and took her out because I didn’t want to compromise her. She had the decency to wake me so I didn’t want to be in a situation where I ignored her. So I would be stood outside on the street at 3 o’clock in the morning in the dead of Winter, you know, just to make sure that she was, because she was, you know I believe in dignity with dogs”.

Bob also got up in the night to let his elderly dog, Darkie, go into the back garden to relieve himself (reflexive journal entry during second interview, April 2019).

Lucy and Josh describe an unusual change in household practices that arose from Simba’s own quirky preferences. They do not shut doors in the flat because Simba does not like it.

“We can’t even shut doors either because he has some sort of fear with doors being shut”.

This includes the bathroom door, which is clearly an inconvenience to them. Concerns for Simba’s safety mean that they no longer open windows at home because Simba once fell out of an upstairs open window.

“Josh: We can’t even open the windows either. Last time we opened a window, we left it open at night and it was at my parents place he walked out of the window and onto the windowsill outside and he fell...”

Lucy – it was two floors as well ... we’ve never opened the windows since”.

When I visited them at their home, it was an unusually hot summer’s day and it was very warm inside the first floor flat but they did not open any windows for fear of compromising Simba’s safety.

This sub-theme ‘Detrimental Changes to Everyday Practices’ is a significant theme in the context of ‘no pet’ covenants because it illustrates the extent to which people will suffer detriment for the sake of their continued relationship with their dog/cat. My findings (detailed in Section 1, Part II, 5.3.2 Lack of Choice) demonstrate that pet-owning tenants will endure detriment and harm arising from ‘no pet’ covenants in order to protect and maintain this relationship. For example, Bob left the care home where he had lived for over four years in order to continue to live with Darkie and Isabel gave up valuable PhD places and scholarships with Oxford and Cambridge University in order to live with her cats,

“The no-pets policy of these two universities was certainly decisive. Had we been pet-less, I’m certain we would have run the risk [Brexit and health checks] and moved to the UK”.

Both David and Julia lived in very poor quality conditions as a direct consequence of wanting to live with their dogs. Julia said,

“I was nearly homeless trying to keep hold of Annie because every time I went to them they said how old are you? Well get rid of the dog and we’ve got something for you and I was like ‘no’. So, I went into private lodging. I lived in a shed in a garden, a shed in a garden”.

David admitted that at times he slept on the street rather than sleep in a shelter that excluded his dog, Mack. He said that Mack is always with him,

“I don’t go where he’s not allowed”.

Detrimental change to existing everyday practices is not considered in the existing literature on pets as family but arose from my interview data as a very significant theme in the context of ‘no pet’ covenants. It is evident that pet-owning tenants are prepared to endure considerable inconvenience and detriment, even harm, for the sake of their companion animals. Getting up at 3am, getting dressed and taking the dog outside, in the middle of winter, to relieve itself is a considerable inconvenience but giving up career and housing opportunities is life-changing.

Shir-Vertesh’s concept of ‘*flexible personhood*’ arose from her discovering the way in which some of her participants excluded their pets from family membership as a result of changes in their lives especially the birth of a baby (2012, p. 428). One of her case studies concerns a couple who initially treated their dog, Albert, as their baby and showered him with love and attention but over the years as they had children, Albert was excluded and ignored until at the age of 11 years he disappeared. The couple were not unduly concerned and assumed he was dead. Shir-Vertesh acknowledges that people extend kinship ties to include their companion animal but says,

“this bond does not necessarily mean durability, resilience and permanence” (2012, p. 427).

My findings demonstrate a different perspective to the effect of life changes. When life circumstances changed, my participants suffered detriment and endured hardship for the sake of their companion animal, sometimes life changing detriment and this strengthened rather than terminated the animal’s family status. In rationalising these detrimental changes to their lives, people emphasised the importance of their companion animal and affirmed their kinship ties.

5.2.3 First Theme - AGENCY: Anthropomorphic model

Agency is reflected in the way that people see their companion animals as ‘minded beings’ (Sanders, 1993) with individual intentions, desires, plans and emotions (Anderson, 2003). By co-habiting with companion animals and living intimately in a confined space on a daily basis, owners come to know the individual personality of their animals seeing them as subjective beings (Fox, 2006; Power, 2008) thereby demonstrating their

“liminal position on the boundaries between ‘human’ and ‘animal’” (Fox, 2006, p. 526).

Owners may ‘talk’ for their pets and explain to other humans how their pet feels (Charles and Davies, 2008; Power, 2008; Shir-Vertesh, 2012; Irvine and Cilia, 2017).

Julia described Annie as a laid-back dog. She sometimes took Annie’s voice to demonstrate this,

“I could never walk without people stopping and people with kids and they’d go “do you mind if my child talks to your dog” and Annie would just stand there and go ‘yeah whatever’.”

In speaking for Annie, Julia acknowledges her ability to share mental states with her dog (Irvine and Cilia, 2017) demonstrating Annie’s subjectivity. Attributing human-like characteristics to his cat, Josh perceived Simba as having the emotion jealousy. He described Simba as “*extremely jealous*” of Lucy.

“If Lucy stayed over or if she stayed for an extended period of time he would get jealous and he would attack. If we walked downstairs to get food or get a drink or something he would like he would chase after us and he would bat her. I mean it looked like he was you know playing around but it’s definitely something where he’s like ‘I don’t like you’”.

Anthropomorphising their pets, by attributing human qualities to them, has the advantage of helping people to explain patterns of behaviour by the pet and thereby predict future actions. Characterising Simba’s actions as jealousy helps Josh to interact with Simba. Since we have not evolved a set of psychological processes specifically to serve our relationships with companion animals (Collis and McNicholas, 1998), it is not surprising that people draw on psychological processes that they use in human-human relationships. Thus, such emotions as jealousy come to be associated with human-pet interactions.

Talking about her dog, Honey, Kate said,

“she was just this strangely human dog ... Honey was more human than I’ve ever seen a dog”. Her husband agreed. “I don’t think that Honey knows she’s a dog. I think she thinks she’s a person”.

Kate referred to Honey's gentle nature, tolerance of everything and love of people to explain what she meant by her 'humanness'. Some scholars are sceptical of understanding animals through anthropomorphised accounts of animal behaviour but appreciate the owner's attempt to understand their animals rather than simply labelling the behaviour as mere animal instinct (Haraway, 2003).

Animals as minded individuals is especially apparent where children have a close relationship with a pet. Research shows that pets can occupy important places in the lives of children (Tipper, 2011) and may be considered as siblings (Power, 2008). Irvine and Cilia observe,

"Children's close relationship with their pets, their communication with their pets, and their tendency to define pets as siblings reveal both their conception of a flexible human-animal boundary and how it intersects with their ideas about family" (2017, p. 6).

Only one of my research participants, Kate, lived with children and her seven-year-old daughter, Jess, had a close bond with their dog, Roxie. When asked if Jess talked to Roxie, Kate said

"Oh yeah, like a person. And if she was upset she would just go. You would frequently hear her chatting to [Roxie] complaining about us or different things like that".

Kate's experience supports Power's (2008) finding of dogs performing a sibling role for children.

5.2.4 First Theme - AGENCY: Affecting human-human interactions

The way in which companion animals affect human-human interactions is particularly relevant because the use of 'no pet' covenants is often justified as preventing conflict between tenants. Therefore acknowledging the effect companion animals have on human-human interactions, both negatively as a source of conflict and positively as a social lubricant, is relevant to my research.

(i) **Causing conflict**

Companion animals, especially dogs, can sometimes disrupt the harmony of social relationships causing tension and conflict within families and between neighbours (Charles and Davies, 2008; Power, 2008). Power (2008) observed that challenging behaviours such as dog aggression, toilet training and destructive behaviour like chewing sometimes caused tension within the families she interviewed.

Annie was a source of conflict between Julia and her daughter-in-law, because the daughter-in-law wanted to keep Annie away from her child and asked Julia's son to intervene,

“For the first 12 months Annie was not allowed near [granddaughter] as a baby because of germs so my son was saying “Please blah, blah, blah” so it was always [granddaughter] would just look at her and smile at her or whatever, and because Annie wasn’t licky or fussy Annie was quite happy to just sit there and then when I first moved here Annie was allowed in the house. She had a blanket on the sofa no problem and then one day my son said “do you mind not bringing Annie in anymore”.

Shortly after Annie died, her son split with his partner and Julia believes that Annie’s death was a catalyst for the separation,

“Annie dying and him worrying about me and her coldness towards me was the catalyst, not the reason they split up, but kind of like ‘what sort of person are you?’. He said ‘I wanted to come and be there for you but she was like this is your family’.”

Bob also experienced conflict because of Darkie. A change in management at the care home led to a new manageress who did not like Darkie and wanted Bob to rehome him:

“Bob - Then there was a chap fell and they tried to make out that the dog tripped him but the ruddy dog wasn’t even near him, aye, so, no,

Friend - They got very nasty to Bob they did. They were bullying him, harassing him and,

Bob - So I thought I would just be on the move”.

Roxie and Honey were the source of a conflict with Kate’s new neighbours. She said that her husband, Lewis, no longer trusts the neighbours because he knows that one of them complained to the landlord about them having dogs (reflexive journal entry from second interview, June 2019).

(ii) Social lubricant

Dogs can facilitate the creation of social networks in neighbourhoods and help owners to make links within the community (Wood, Giles-Corti and Bulsara, 2005; Wood *et al*, 2017). Charles and Davies observe that,

“The social networks that animals help to create and in which they play an active part can be conceptualised in terms of bonding social capital” (2008, p. 8.8).

Social Capital has been defined as the

*“connections among individuals, social network and the norms of reciprocity and trustworthiness that arise from them” (Putnam, 2001, p. 19 quoted in Wood *et al*, 2017).*

A comprehensive study involving 2,600 people in Australia and the United States found that pet ownership increases social connectedness within local communities creating higher levels of Social Capital (Wood *et al*, 2017). Irvine (2013a) and Carr (2016) observe how a homeless person’s companion animal can act as a medium through which the homeless person and the domiciled population can connect.

(a) Within the family

Annie's close relationship with the other members of Julia's family was important to Julia,

"It was all dependent on everything else so, how [granddaughter] was with Annie, how Annie was with [granddaughter], how she adored my son, how I adore [granddaughter], and I adore my son and Annie was constant".

Kate talked about the very close bond between her young daughter, Jess, and their staffie, Roxie. She describes them as "best friends",

"They were just inseparable. If Jess was on the sofa Roxie was on the sofa, If Jess was playing outside Roxie was playing outside. Even if she was just lying on the ground, Roxie was lying on the ground near where she was but that's just what they were like, they were each other's shadow really".

In each case, the dogs formed part of the dynamic relationship within the family. They were not just passive recipients of care but active contributors to the rich network of family relationships. The fact that Annie was both loved by those closest to Julia and loved them in return better integrated her into Julia's "inner circle" of relationships.

(b) Within the wider community

Julia recognised how Annie helped her to talk to other people in her local community,

"the thing that I found with dog owners as well is it also leads to you having a conversation with somebody because they like your dog".

Julia is retired and prior to Annie's death, three months before our initial interview, she lived alone with Annie in sheltered housing. She loves walking but feels she cannot go out into the local parks without a dog,

"I'm not going to sit on a bench, well I'd feel odd if I sat on this bench now, I could but when you're sat with a dog it gives you permission to do all sorts of things you just wouldn't do on your own".

Without the link to the local community that Annie provided, Julia feels 'entombed' in her flat and is becoming increasingly isolated.

After my initial interview with Bob, we went to a cafe near his home and I observed that a number of local people came over to talk to Bob in order to meet Darkie (reflexive journal entry, September 2017).

5.2.5 Conclusion to Agency theme

Agency was a dominant theme to emerge from Power's (2008) empirical study of new dog owners and their relationship with their dogs. Power found that for some dog owners the idea of dogs as family was

“shaped by the agency and activity of individual dogs” (2008, p. 541).

The theme acknowledges how dogs are active in family-making through forming routines with existing family members. My findings demonstrate the relevance of Agency in understanding how people in the UK construct dogs and cats as family members. For Power’s participants ‘pack relations’, in which owners emphasised the importance of rules, leadership and human-dominated hierarchy, played a prominent role in family relations. I did not find this to be the case with my participants. With the exception of Julia, who previously worked as a dog trainer, none of my participants talked about dominance and leadership. This may be explained by Power’s sampling strategy because she interviewed new dog owners recruited from a dog training class that used ‘pack’ psychology methods, whereas my participants had all lived with their pets for a number of years. Power refers to dog agency being asserted within everyday family relations as

“slippages and ruptures to these hierarchical relations” (2008, p. 546).

Whereas with my participants the agency of the animal appeared as a normal part of daily life having been established over a number of years through everyday encounters and close interactions between the owner and their companion animal, each developing growing knowledge of the other. In this way, the agency of the animal was an integral part of daily life and not a mere slippage.

The companion animal is not a passive recipient moulded to fit existing routines but instead is an active contributor in shaping and changing everyday practices that constitute family. Significantly for my research on ‘no pet’ covenants, my findings illustrate how pet owners endure detrimental changes to household practices, especially in relation to sleep, in order to live with their companion animal. This resilience to hardship for the sake of their pet is evident when pet-owning tenants are faced with ‘no pet’ covenants and choose to endure hardship, such as poor quality housing, rather than relinquish their companion animal.

5.2.6 Second theme: Social Support

Scholars identify the social support provided by companion animals as a relevant factor in the owner's perception of the animal as kin (Charles and Davies, 2008; Irvine, 2013a). One of the themes from a study on families and kinship networks in Swansea, Wales was the Cultural Construction of Kinship,

"It seems clear ... that family and kinship are socially constructed and that different rationales are used to justify the choices made" (Charles and Davies, 2008, p. 9.3).

The study found that a key factor in constructing kinship was the level of support provided by others; with a clear correlation between giving high levels of support and being classed as kin. This is significant to understanding how pets are constructed as family because there is extensive literature evidencing the ways in which companion animals provide valuable social support to their owners (see section 1.5.2 of the commentary; examples include Bonas, McNicholas and Collis, 2000; Enders-Slegers, 2000; Anderson, 2003, Irvine, 2013a). It is not surprising, therefore, that the researchers in Swansea found that many of the interviewees spontaneously included their pets as part of their kinship networks without any prompting from the researchers who had in fact not anticipated the inclusion of pets in kinship. My research participants provided clear evidence of their pets as care-givers and led me to identify 'Social Support' (a broad category to encompass emotional and social support as well as benefits to physical and mental health) as a key theme in my findings (see *figure 8*).

Isabel was recovering from blood cancer when she and her boyfriend adopted Badger and she talked of the cat's role in her recovery,

"I now know that Badger was of great help for my recovery, despite the sleepless nights. He was always there and even looked to be aware of my emotional state sometimes, and tried to fix it".

Kate described how the dogs helped to calm her if she suffered a panic attack,

"I used to get panic attacks quite frequently and both dogs were quite good that way. They would just instantly calm me down. You know, Roxie would come over and she would do that thing with the paws up and Honey would just lie and let me pat her and just by patting her, my blood pressure would come down straight away, I would calm down you know".

The dogs also supported her husband, Lewis, who suffered from Post-Traumatic Stress Disorder (PTSD),

"they've been great with my husband, you know, he's got his PTSD and things so they just seemed to know when he was feeling a bit low or whatever and they wouldn't leave his side, at all".

Lucy described a time when Josh was unwell and Simba provided support,

“there was a time when Josh was extremely unwell and Simba literally didn’t leave his side. I actually picked him up at one point and brought him into the other room just to give Josh a bit of peace and he walked straight back to him and sat down next to him so I think it’s just nice to have an animal that cares about you”.

Josh said that in his first year at University, he had severe anxiety attacks and Simba would not leave his side. Describing an incident when he came home drunk, Josh said

“This puts me in a bad light but I fell asleep on the bathroom floor and apparently [Simba] didn’t leave my side all the way through it”.

Drawing on Charles and Davies’ (2008) concept of the Cultural Construction of Kin, it is likely that the high levels of support my participants receive from their companion animals contributes to their constructing them as family members. Power (2008) identifies caring relations as one of her three themes in understanding the human-dog relationship but she focuses on care-based encounters in which the dog is the recipient and does not explore the concept of the dog as a care-giver. Her ‘Caring’ theme therefore differs from my ‘Social Support’ theme which embraces the animal as a care-giver and emphasises ways in which companion animals support the physical, mental and emotional well-being of their owners. Research on homeless pet-owners in the USA and UK has also recognised the care-giving role of companion animals (Taylor, Williams and Gray, 2004; Irvine, 2013a and 2013b; Carr, 2016). Being homeless and alone made my research participant, David, vulnerable and he relied on his dog, Mack, to provide valuable support,

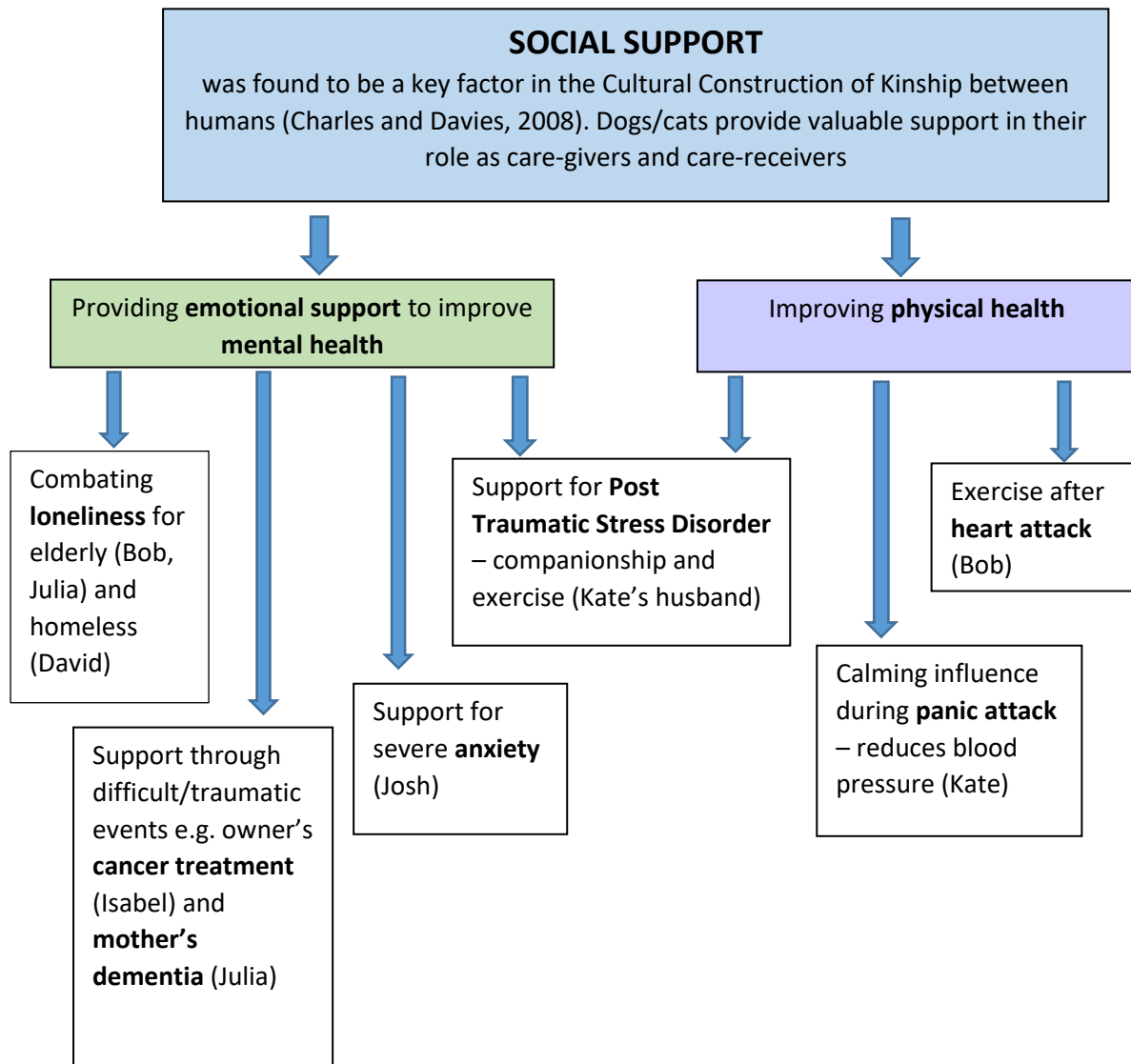
“he looks after me”.

Given that the provision of support is important in defining family and given that companion animals provide valuable social support and care, it is not surprising that Charles and Davies conclude that,

“This points to the importance of support and the quality of the relationship in defining who is and is not counted as family and makes it possible to include ... non-human animals as family members” (2008, p. 6.2).

My findings demonstrate that the social support and health benefits enjoyed through the human-companion animal relationship continue to play a role in the construction of pets as family members in the UK.

Figure 8 – SOCIAL SUPPORT theme arising from research question 1: How do people in the UK construct companion animals as family in everyday practices?



5.2.7 Third theme: Ambivalence

The literature identifies the relationship between humans and animals as one of ambivalence (Arluke and Sanders, 1996; Serpell, 1996). It has been observed that the ambivalence that characterises our relations with animals permeates our relations with pets (Fox, 2006; Charles and Davies, 2008; Power, 2008; Smith, Johnson and Rolph, 2011; Irvine and Cilia, 2017) and threatens their status within the family unit,

“The ambivalence with which we regard animals raises the question of whether pets can truly attain full family membership” (Irvine and Cilia, 2017, p. 3).

The large number of animals that are relinquished to rehoming shelters every year is seen as evidence of this ambivalence (Fox, 2008; Shir-Vertesh, 2012). For example, in 2018, the Dogs Trust National contact centre in the UK took 30,408 calls from owners wanting to rehome their dog (Dogs Trust Annual Review, 2018). Charles and Davies (2008) suggests that this continued ambivalence was evident in their interviewee’s embarrassment at including pets as kin,

“Thus interviewees tended to ‘test the water’ to see how the interviewer would react to any revelations about animals as family members” (2008, p. 5.6).

However, interviews with vet practitioners, who have the advantage of being able to reflect on many years’ experience of interactions with pet owners, found that in recent year’s people are much more willing to openly call their pet a substitute child (Franklin, 2006). As discussed earlier, for many of my participants their relationship with their companion animal came within the Parent-Child model (Power, 2008) and there was little evidence of embarrassment at this categorisation of the relationship.

Both Julia and Emma were angry at suggestions by local authority housing officers that their companion animal was ‘only a dog’ that could be given up. Emma asked the council for help with finding pet-friendly accommodation,

“I called our council ... the lady told us “well you’ll have to get rid of your dog.” I went absolutely mad. I said to her “Would you give up your children because your landlords won’t allow them? Would you give up your children? ... she goes “Oh don’t be silly Emma.” And I said “no, I’m not being silly what you’ve just said is absolutely outrageous”.

A manager at the council later called her back to apologise for the insensitivity of the housing officer.

Julia was angry when the council officer suggested she get rid of her dog so she could find private rental accommodation more easily,

“he said “Well, no you rented privately before, rent privately again”. I said “It’s really difficult with the dog” and he said “Get rid of your dog” just like that.”

Far from accepting his perception of her relationship with Annie as trivial and disposable, Julia challenged his response with her own proposal of how to deal with the housing problem,

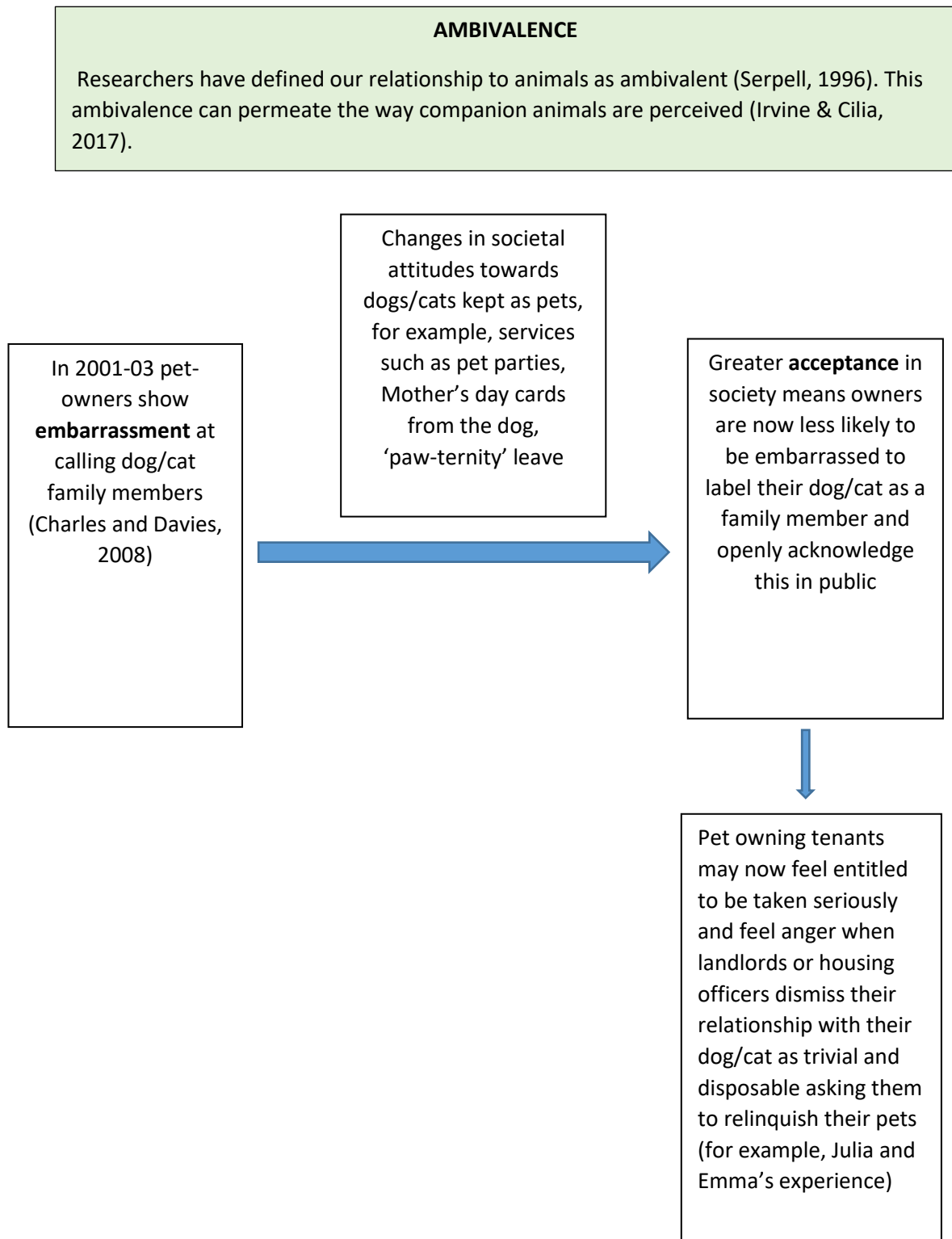
“my parting comment was “do you know what? I’m going to get a shopping trolley and a bin bag and a sleeping bag and I’m going to go and sit in Broad Street and I’m telling you now this dog will earn me enough money that by evening I’ll go into a hotel” because I knew she would because she would just sit there all day looking at people and he was like “that’s your problem you silly old fool”.

My findings suggest that the sense of embarrassment at seeing a pet as family, felt by participants in Charles and Davies’ (2005) study carried out in Wales in 2001-3, is gradually shifting as societal attitudes become more accepting of this terminology even encouraging it in some instances, for example, evidenced by High Street shops selling Mother’s Day cards from the dog (see Appendix 2). Julia and Emma felt entitled to have their relationship with their dog taken seriously by the local authority housing officers. Their reaction of anger rather than embarrassment suggests a tentative shift in how society views someone who sees their pet as a member of their family. There is a gradual shift away from a story of embarrassment to a story of acceptance as demonstrated in *figure 9 ‘Ambivalence theme’*.

5.2.8 Conclusion to section 1, Part I

In addressing my first research question, ‘*How do people in the UK construct companion animals as family members in everyday practices?*’ three key themes emerge from the thematic content analysis of my seven interviews: Agency, Social Support and Ambivalence. These three themes are closely aligned with themes arising from the existing literature on ‘pets as family’, for example, Power’s (2008) empirical work on new dog owners identified themes of Canine Agency, Caring, Rules and Behaviours. Although our themes of Agency and Social Support/Caring are similar, demonstrating the similarities in how people construct companion animals as family members in Australia and the UK, there are notable differences. In contrast to my theme of ‘Social Support’, Power’s ‘Caring’ theme does not consider animals as carers only as recipients of care and her Agency theme does not include Detrimental Changes to Everyday Practices. This is a key sub-theme for my research because of its link to understanding the effect of ‘no pet’ covenants on tenants and the willingness of pet-owning tenants to endure hardship for the sake of continuing to live with their companion animal.

Figure 9 - AMBIVALENCE theme arising from research question 1: 'How do people in the UK construct companion animals as family in everyday practices?'



5.3 Section 1, Part II – Thematic Content Analysis: How people in the UK experience a ‘no pet’ covenant in their residential lease

There is very little qualitative research on the effect of ‘no pet’ covenants on tenants. A recent human geography study in Australia examined the connections between companion animals and housing access and security for tenants (Power, 2017) and a recent study carried out in Canada by academics in human and veterinary medicine, examined the effect of ‘no pet’ covenants on young tenants with dogs (Graham *et al*, 2018). Both of these studies used in-depth qualitative interviews with pet-owning tenants and I found their findings valuable in my research. A particularly interesting finding from my research is the striking similarity in the experience of pet-owning tenants in Australia, Canada and the UK. The two existing studies identified the following themes: Rental Insecurity, Low availability and Poor Quality Property, Discrimination and Powerlessness in Negotiations. I found all of these themes relevant to my data and consider them in more detail below. In addition, I added the themes of Lack of Choice (a more expansive version of the Low Availability and Poor Quality housing theme), Mental Health and Ambivalence.

Neither the Australian nor Canadian study investigated the status of the companion animal within the research participant’s household. Each study relied on the existing literature to show that people often consider their companion animals as family. As explained in section 1.3.1 of the commentary, it is the assemblage of human+animal+home+lease that is the relevant subject for my research (Michael, 2000). My research, therefore, builds on these studies by examining the status of pets within the households of those tenants who are the research participants. This approach allows me to understand the interconnections between the human-companion animal relationship, family practices and ‘no pet’ covenants thereby providing a more holistic and insightful appreciation of how tenants experience ‘no pet’ covenants in practice.

5.3.1 Theme one: Rental insecurity arising from hiding undeclared pets

Power (2017) carried out a 10-year study in Sydney, Australia exploring the impact of pet ownership on rental insecurity. In her study the concept of rental security

“speaks to the capacity of renter households to create and maintain a sense of home” (Power, 2017, p. 338).

She relies on the concept of ‘secure occupancy’, which is defined as

“the extent to which households who occupy rented dwellings can make a home and stay there, to the extent that they wish to do so, subject to meeting their obligations as a tenant” (Hulse and Milligan 2014, p. 643).

Within this expansive concept of rental security, it is possible for a tenant who is currently living in a pet-friendly property to have a sense of rental insecurity based on “*a reduced sense of control over their rental futures*” (Power, 2017, p. 350). Their perception of the difficulty of acquiring pet friendly housing creates rental insecurity even though there may in fact be no risk of imminent termination of the tenancy. I am defining the concept of ‘rental insecurity’ more restrictively to exclude such tenants who perceive risk where none currently exists. I limit ‘rental insecurity’ to those situations where there is a realistic risk of the tenant’s eviction in the immediate future. Under English law there is always a risk of a no-fault termination of a lease by a private landlord under a s.21 notice (Luba, 2016) so I am not including this risk in my definition of ‘rental insecurity’ because that risk is ever present in private rentals. Therefore, my concept of rental insecurity applies to tenants who are at risk of being evicted because they are in breach of a ‘no pet’ covenant in their lease. This was relevant to a number of my research participants and can occur where a tenant fails to disclose a pet when they initially rent the property (as was the case for Kate) or where they later acquire a pet while already living in the property (which happened to Lucy).

Power’s study examined the occurrence of undeclared pets. She found that the majority of the 679 responses to her survey (71%) declared some or all of their animals when applying for a lease (2017, p. 352). The statistical data showed that there was a relationship between respondent age, household type and type of pet and the likelihood of declaring a pet; older respondents declared pets more frequently than younger ones and those with children declared more often than those without. Power suggests the consequence of an eviction is more serious for older people and those with families, which could explain this difference. Dog owners declared more often than cat owners, which is likely to be due to the greater visibility of dogs in the community making them harder to hide (a problem experienced by Kate).

Power observed that,

“Alongside honesty, stress and worry associated with non-declaration was the most significant theme” (2017, p. 353).

The stress and worry were prompted by the fear of eviction if the animal was discovered. Power found that the primary motivating factor for not declaring a pet was concern about the difficulty of finding pet-friendly rental housing.

Two of my participants, Kate and Lucy, hid their pets from their landlord in breach of a ‘no pet’ covenant in their lease. The stealth strategy they adopted worked in part for Lucy and Josh because the landlord never found out about their cat but the whole process of hiding the cat was so stressful they eventually moved to a pet-friendly property. The stealth

strategy was unsuccessful for Kate because the landlord discovered the existence of the dogs and she and her family faced the prospect of eviction unless they rehomed the dogs quickly.

Power (2017) found that tenants who failed to declare a pet to the landlord hid their pet during inspections of the property which proved to be complex, time-consuming and stressful. Lucy and Josh used various strategies to hide Simba during landlord inspections of the flat every three months. They usually put Simba in a cat carrier and moved him out of the flat for several hours which was a time consuming operation requiring careful prior planning. For example, Josh explains

“there’s a pub downstairs. The person who runs the pub was kind enough to just let me in there...I took a couple of books down and just read and [Simba] was fine, he just fell asleep”.

At other times Lucy took Simba to a nearby cafe. There is also the additional worry that neighbouring tenants may become aware of Simba if he is noisy and report his presence to the landlord. Lucy explains

“We worry if other tenants know and other tenants maybe realise that we’re not meant to have a cat for any reason like maybe they’re not allowed pets. I don’t know if they would but I think I worry sometimes if they hear him meowing they’d be like report him”.

My findings show the similarity between UK tenants and tenants in Australia (Power, 2017) and Canada (Graham *et al*, 2018) as tenants in all three countries adopted a stealth strategy to conceal their undeclared pets from their landlords. This can adversely affect the mental health of tenants due to the increased stress and anxiety associated with their dishonesty and the fear of being discovered and evicted.

5.3.2 Theme two: Lack of Choice

Power (2017) identified low availability of pet-friendly housing and poor quality housing as a sub-theme of Rental Insecurity. She examined the challenges pet owners face when searching for rental property in Sydney, Australia. In Sydney housing is scarce creating a very competitive market that gives landlords a large pool of tenants to choose from. She examined how these challenges created a sense of rental insecurity even for tenants who currently lived in pet-friendly housing. I use a narrower definition of rental insecurity and consequently categorise concerns over the quality and suitability of property under a separate theme of Lack of Choice. This theme also encapsulates the lack of choice that some of my participants felt when, due to the effect of the ‘no pet’ covenant, they were forced to take action they did not want to take such as moving home or rehoming their dogs.

5.3.2.1 Lack of Choice: The poor quality of pet-friendly housing due to its low availability

The prevalence of ‘no pet’ covenants in private sector housing in the UK means there are limited numbers of pet-friendly properties available for let. A recent Government press release suggests that it may be as low as 7% of private housing that is openly advertised as pet-friendly (MHCLG, 2020a). All of my research participants were adversely affected by this low availability; Emma faced problems searching for pet-friendly housing in the south of England,

“All of their adverts were no pets, no pets, no pets, everywhere we were looking was no pets, no pets and it was only by chance that I saw this house because it was two doors away from us and they had a big Irish Wolfhound in here and so it came up for rent and we had to snap it up and we begged and pleaded with the estate agents, letting agents to let us in otherwise we were going to be homeless”.

She even applied for property where the listing stated that no pets were allowed,

“we still applied because we’ve learned that sometimes you just have to still apply just in case, besides you have no choice you have to, everything’s got no pets on it, absolutely, it’s very rare to get pets considered down here, very, very rare”.

Lucy and Josh had a similar experience in the North of England when they decided not to renew their lease (due to the stress of concealing their cat from the landlord). They wanted a pet-friendly property in the right location and price range but encountered problems,

“when I actually started ringing up people to arrange viewings and whatnot if they didn’t mention pets I would ask about it and they would usually say ‘no pets allowed”.

In Scotland, Kate found it difficult to find pet-friendly property near her daughter’s school and their work,

“We’d trawled websites, adverts and everything. There was just nothing, there was just nothing in the area”.

From her interviews, Power (2017) identified a number of compromises that pet-owning tenants made when searching for, and renting, pet-friendly property in Australia due to its low availability (p. 351):

- i. Quality and repair: accepting property in a poorer state of repair than the tenant would like;
- ii. Quality and cleanliness: accepting property that is in an unclean state;
- iii. Location: accepting property in an unsuitable location, for example, an unsafe neighbourhood;
- iv. Cost: accepting property at the top end of the tenant’s budget or even over-budget, thereby causing financial stress.

In Canada, Graham *et al* found similar concerns over the quality, location and cost of property for young tenants living with dogs observing that,

“To keep their dogs, younger adults had to make compromises over the quality of their rentals” (2018, p. 37).

It is likely that where property is in a state of poor repair, the landlord sees any potential property damage by pets as less of a risk to the value of the property and therefore is more willing to accept pets (Power, 2017) especially if this enables them to charge an additional pet rent as is the current practice in England following the Tenant Fees Act 2019. One of the participants in the Canadian study complained of having to “pay \$200 extra per month (\$100 per dog)” in rent in addition to a security deposit and non-refundable pet fee (Graham *et al*, 2018, p. 5).

Some of my participants had a similar experience of compromising on the quality of the property especially on the state of repair and cleanliness, in order to be able to live with their companion animals. Julia lived in a number of different places in order to keep her dog, Annie, with her. Her experience gives an insight into the difficulties of finding pet-friendly private housing in the south of England. Her examples include a garden shed, a summerhouse, a converted garage and a lean-to:

“I lived in a shed in a garden, a shed in a garden”.

“I’ve got a summerhouse here which you can have for...” and next door to it there was a converted garage that had, when I had already moved in, a shower. She said “your dog’s welcome” so I thought ‘beggars’ can’t be choosers’ so I moved in there”

“A woman in Wokingham rang me. She said “I’ve got a converted garage” except it wasn’t a converted garage it was her garage with a double bed in and she’d put a shower in. Again, the dog was welcome. It was horrific”.

“I went into the room and I could see this lean-to and there was a single bed in it but it went through to the garden and the door was open so she said “yeah I’ll show it to you.” She wanted £500 a month and I said “Where is it?” and she went “there” and I said “but you’re all walking through to the garden” and she said “yes but you can lock it at night””.

I have included all of these examples here to better illustrate the sense of hopelessness and desperation one person can feel when faced with continual lack of choice over pet-friendly housing. It was not just a one-off experience for Julia. She endured numerous instances of poor quality housing over an extended period. The prevalence of short term, insecure lets (the Assured Shorthold Tenancy in the private sector promotes short term letting of 6-12 months and makes it easy for landlords to terminate a lease) means pet-owning tenants may have to find new housing multiple times within the 10-15 year typical life expectancy of a dog or cat (Power, 2017). Emma also experienced problems with the poor quality of pet-friendly property in the south of England:

“Because we had a dog the places that we were shown before we settled on this one were just terrible, Debbie. I mean I actually, I cried in one of the houses because there was no kitchen, if they thought that was the kitchen... it was there was holes all along,

there was cupboards hanging off the wall, the oven looked like it was from 1960, you went upstairs into the bathroom, the floor was rotten ... and these were the properties that we were shown because we had a dog”.

These examples from my participants illustrate that the concerns pet-owning tenants in Australia and Canada had about the substandard quality of pet-friendly property apply to pet-owning tenants in the UK.

5.3.2.2 Lack of Choice: The effect of ‘no pet’ covenants on tenants

Lack of choice is also evident in the effect a ‘no pet’ covenant can have on the tenant’s life and is closely connected to the theme of powerlessness in negotiations. A number of my participants felt that the ‘no pet’ covenant forced them into action they would not have taken by choice whether it be to move home, relinquish their companion animal or abandon career opportunities.

When Bob was sent a letter from the landlord’s solicitor telling him to rehome Darkie or face eviction, he felt he had no choice but to move from the care home. He did not see relinquishing Darkie as an option

“Well they said that I could stay on condition I got rid of Darkie but there was no way I was going to do that”

and therefore the only action he could take was to move. He rented a bungalow in the private sector forcing him to give up the care, support and companionship he enjoyed at the care home. When I met with him for our second interview in 2019, he complained of the lack of home support he was receiving and the isolation of living in a town where he did not know anyone even his immediate neighbours. He was not happy he had moved there but felt he had no choice.

Kate took a risk when she moved into a house with a ‘no pet’ covenant and failed to disclose the presence of her two dogs to the landlord. She felt she had no choice because of the lack of availability of pet-friendly property in the area. The landlord insisted Kate rehome the dogs when she discovered they were living in the house. Kate reluctantly complied because there were no alternative rentals available and she could not make her young family (including a three-month-old baby) homeless. The landlord

“just put me under so much pressure that they just had to go”.

Isabel was offered a PhD scholarship at both Oxford and Cambridge University but gave up this lucrative opportunity when she realised she would not be able to find affordable accommodation that would permit her cats to live with her,

“I declined my offer at Oxford in March, thinking that we might find something better in Cambridge, but the situation there, as we found out later, was very much the same. I couldn’t believe that both universities didn’t take into consideration that the concept of “family” could also involve animals. It felt as ridiculous and frustrating as reading a lease contract where it was stated that family accommodation allowed all members except babies”.

David was homeless when I interviewed him and he explained that he had been offered accommodation in the past that he had refused because he was not allowed to take Mack with him:

“Researcher – So they offered you a flat?

David – They offered me a few flats. Pets not allowed.

Researcher – So you chose not to take the flat?

David – It’s not a choice. Come as a team”.

David’s words highlight the lack of choice he experienced. He could not rehome Mack – that was not an option for him and consequently he had no choice but to refuse accommodation that was exclusively for humans. David’s experience in England is similar to that highlighted by Irvine’s research on homeless people and their pets in the USA where she found numerous examples of homeless people refusing shelter in order to stay with their companion animal (Irvine, 2013a).

The examples in this section illustrate the extent to which pet-owning tenants will make compromises and endure hardship to counteract the effect of ‘no pet’ covenants. My findings suggest a link with my sub-theme ‘Detrimental changes to everyday practices’ discussed in Section 1, Part 1, (5.2.2.2) where pet owners endure detriment, such as sleep deprivation, for the sake of their pet. These detrimental changes to everyday routines may provide ‘practice’ for larger, life-changing events such as Bob moving home for his dog. Pet owners are accustomed to enduring some detriment for the sake of their pet and this gives them resilience when faced with the larger threats caused by ‘no pet’ covenants. Far from excluding pets from family membership (Shir-Vertesh, 2012), the response of my participants served to reaffirm their family status. Isabel gave up valuable university scholarships, which may be judged by others as unwise, but she rationalises her actions as keeping her family intact. Protecting family is a worthwhile cause and in this way, her justification for her action serves to confirm the status of her cats as family members.

5.3.3 Theme three: Powerlessness in Negotiations and perceived Discrimination

The housing crisis in the UK means that private landlords hold all the cards and tenants have little or no bargaining power (Arden, 2018). Graham *et al* (2018) interviewed young

tenants with dogs living in Canada and found that they felt powerless in negotiations when applying for housing advertised as 'pets negotiable'. The landlords and property managers would allow one, small pet but not dogs and were not open to negotiation on the question of dogs. My research uncovered a similar sense of powerlessness in negotiations with private landlords in the UK. When Josh moved into Lucy's flat with Simba, she was too scared to ask the letting agent if they could have a cat so she anonymously phoned the agent to ask about a similar flat for let in the same building,

"I phoned up [the letting agent] myself under the premise I was looking for an apartment round here and I was like "what about pets?" Saying "Is there any circumstance where they allow one and they were like "no, you're not allowed one"".

Lucy did not even try to negotiate because she knew she could be evicted for living with a pet in the flat and she did not want to alert the landlord to the possibility of them already having a cat.

In my research the sense of powerlessness in negotiations extended beyond Graham *et al's* population of young tenants with dogs and beyond the initial stage of searching for property. Two of my participants (aged 87 years and late 30s respectively) were already living in the property with a pet when they tried to negotiate with the landlord/manager. In these cases, the stakes are higher because the tenant faces an imminent risk of losing either their pet or their home if the negotiation fails. Bob was forced to either give up Darkie or give up his home. He tried to negotiate with the owner to reach a compromise that would allow him to have Darkie at weekends but was unsuccessful:

"I tried to reason with him but err, no and then I tried to say to the owner if I could let him away so many nights a week could I have him at the weekends but err, that didn't go down well, just like a brick".

Kate also tried to negotiate with the landlord to keep her two dogs but the landlord insisted on the dogs being rehomed.

"We said we are quite happy for you to come and meet them. Come and have a look at the house to see that they are not in any way damaging it or destructive or anything like that and we're quite happy to pay a pet deposit if that is needed. If that gives the landlady peace of mind and this that and the other but it was, but nothing was good enough".

In both cases, the tenants felt powerless in their negotiations with the landlord/property manager due to their lack of bargaining power. Both were aware that private landlords can easily find new tenants, due to housing shortages in the UK, and consequently there is little incentive to induce the landlord to re-negotiate the terms of the lease. In the light of this powerlessness, Bob and Kate felt they had no choice. Bob reluctantly moved out of the care home into a privately let bungalow in a new town where he knew nobody and Kate

reluctantly rehomed her dogs unable to rehome them together due to the urgency with which the landlord wanted them out of the property. Both felt 'forced' into taking action they would not choose to take.

'No pet' covenants may engender feelings of discrimination on the part of pet-owning tenants arising from this sense of powerlessness in negotiations. Graham *et al* found that,

"younger adults believed that landlords and property managers discriminated against them, especially if caring for large dogs or dogs of certain breeds" (2018, p. 36).

They were either refused property or had to pay a non-refundable pet-surcharge, either way they perceived this as unjust differential treatment based on being a dog owner. Graham *et al* suggest there could be an alternative explanation based on landlords seeing younger tenants (especially students) as an economic risk

"landlords and property managers may be using pet-related surcharges to screen younger adults with dogs, whereby those who agree to pay extra show further economic stability and are thus seen as worthy of tenancy" (2018, p. 41).

My findings build on this research expanding its scope to include older tenants (including working professionals). I found that older people can also feel discriminated against based on their pet ownership. It suggests that the differential treatment of pet-owning tenants is more likely due to their pet ownership, and the perceived risk of property damage caused by the animal, rather than the financial stability of the tenant.

Emma (a 46-year old manager in the insurance industry) felt that where the rental property was a house with a garden as opposed to an apartment, it was discriminatory to exclude tenants with pets.

"So why shouldn't we be able to [own a dog] when the next door neighbour can have a dog because you know they own their house so it is discriminatory because they own and we rent".

Her reasoning is based on the nature of the property and whether it is suitable for dogs, rather than the ownership of the property. As long as she is paying the rent, she does not see any justification for the landlord to exclude dogs. She had this conversation with a housing officer at her local council who told her that excluding pets is not discriminatory because discrimination only occurs if based on specified characteristics such as sex and religion. Emma reasons that it is the perception of the differential treatment that matters rather than the legal definition,

"You know they say discrimination is about sex, ethnicity, age, religion, you know, I suppose that's the true meaning of discrimination but it still feels like discrimination".

She continued,

“It sure feels like discrimination. Perception is the truth at the end of the day you know... if it feels like it then surely it is to that person”.

The housing officer limited the concept of discrimination to its legal definition, but as Emma observes, the perception of discrimination can be just as real for the person experiencing it. If pet-owning tenants suffer detrimental treatment in the availability and quality of housing, on the sole basis of being a pet owner, it is not hard to see how this creates a feeling of discrimination and a consequent sense of injustice.

5.3.4 Theme four: Adverse effect on tenant's Mental Health

Creating a mind map of themes relating to the tenants' experiences of 'no pet' covenants demonstrated the significance of the 'mental health' theme because all of the other themes linked to the tenant's mental health. *Figure 10* provides a map of the links to illustrate the interconnectedness of the themes. All of my participants reported that the existence of the 'no pet' covenant in their lease had an adverse effect on their mental health causing stress, anxiety and in some cases, suffering and grief.

The stress caused by the threat of eviction had a detrimental effect on Bob's physical and mental health. He was not sleeping, eating and he was getting pains due to all the uncertainty of where he would live.

“I was quite unhappy because I just didn't know where I was going to end up”.

Lucy and Josh found hiding Simba during inspections very stressful and they worried about neighbours hearing him moving around the flat or seeing him through windows. They also worried about finding a pet-friendly property and started searching months in advance of the termination of their lease. Lucy observed,

“I used to get really panicked thinking we're just going to get kicked out”.

Julia, talked about the support she received from living with a dog and how she feels “disabled” by the 'no pet' covenant that prevents her from keeping another dog now that Annie has died. She feels “entombed” in her flat,

“I feel entombed and that is the word I choose to use, when I go in to that flat now I feel entombed because I have no motivation to come out of it”.

Referring to her experience of 'no pet' covenants and her reason for setting up an on-line petition against the use of the covenants, Emma said,

“I was just so angry and upset and stressed”.

Kate talked about how upset she was when she rehomed her dogs,

“I was packing [Roxie’s] stuff in a bag and getting her stuff ready and I was really upset and [daughter] was really, really upset and Roxie knew something was wrong”.

When I met with Kate a year later, she told me how she had received counselling for depression since we had last met and she believes the loss of her dogs played a role in her illness (reflexive journal entry, June 2019).

Social Support was a key theme in Part I (5.2.6, Second theme: Social Support) arising from the considerable evidence that the human-companion animal relationship benefits the social, emotional and physical health and well-being of humans. To jeopardise that support by threatening the continuance of the human-companion animal relationship through the use of ‘no pet’ covenants naturally has an adverse effect on the tenant’s mental health. Therefore, the themes of Support (in Part I) and Mental Health (in Part II) are clearly intricately linked (see Portfolio component 2, 3.8, *figure 6 – Examples of mind maps in my reflexive journal, (c) the importance of the Mental Health theme*).

5.3.5 Theme five: Ambivalence to animals: a lack of understanding by housing officials

Power (2017) observed that letting agents who told prospective tenants to give up their pets failed to recognise the significance of the relationship between the owner and their pet,

“These agents did not recognise the importance of companion animals to applicants, instead viewing them as a form of property that could be disposed of as needed to secure a house” (2017, p. 350).

Smith, Johnson and Rolph identified a “*story of ambivalence*” in the context of care homes for older people with many having to give up their pets even in the face of considerable evidence that companion animals contribute to their health and wellbeing (2011, p. 217).

As discussed in section 1, Part I under the theme of ‘Ambivalence’, I did not find that my participants treated their companion animals in a contradictory way. Even Kate’s rehoming of her two dogs is not a sign of ambivalence on her part but rather a need to prioritise between different family members - her children over her dogs (see 5.4.2 Kate – a story of loss). However, there is evidence of ambivalence to animals in wider society and some pet-owners do treat their pets as disposable. The legal status of domestic animals as property exacerbates this problem.

A number of my participants experienced similar insensitive suggestions to give up their companion animals in order to obtain housing. Julia and Emma experienced this with local authority housing officers, Kate experienced it with her private landlord and for Bob it was the manager of his care home.

"I called our council which, bearing in mind we're paying £189 a month in council tax to them, the lady told us "well you'll have to get rid of your dog." I went absolutely mad" (Interview with Emma).

"I said "It's really difficult with the dog" and he said "Get rid of your dog" just like that, so of course I really bristled" (Interview with Julia).

"... nothing was good enough for them and it was a case of she'd ask that the dogs are removed as soon as possible" (Interview with Kate).

"... he just come in and said what he had to, that the dog had to go or I could stay but the dog had to go" (Interview with Bob).

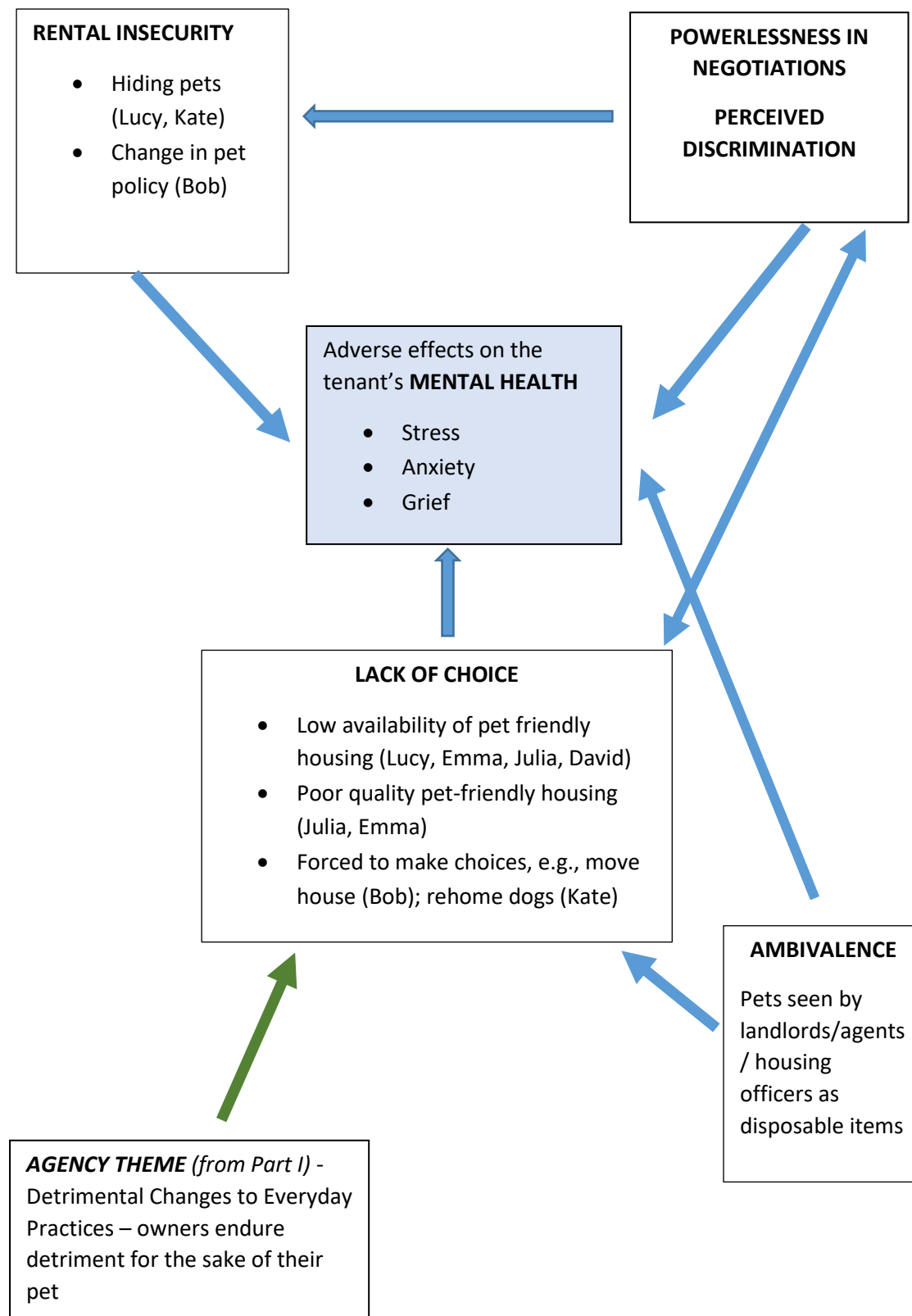
These examples demonstrate the ambivalence of society towards companion animals.

The dominant cultural framing of 'good pet ownership' requires a lifelong commitment to the companion animal. Government policy encourages pet owners to see their pets as *"a major responsibility"* and to accept a lifelong responsibility for the well-being of the animal, emphasising that dogs live *"on average 12 years"* (Defra, 2017, p. 1). In conflict with this framing of good pet ownership as a lifelong commitment, landlords and letting agents can require owners to relinquish their companion animals as if they are disposable possessions (Power, 2017). The theme of ambivalence is visible in these conflicting cultural messages.

5.3.6 Conclusion to section 1, Part II

In seeking to understand the lived experience of 'no pet' covenants for pet-owning tenants in the UK, five themes emerge from the thematic content analysis of my seven interviews: Rental Insecurity; Lack of Choice; Powerlessness in Negotiations and Perceived Discrimination; Mental Health and Ambivalence. That most of these themes arose in the recent studies from Australia (Power, 2017) and Canada (Graham *et al*, 2018) demonstrates the similarities in pet-owning tenants' experiences of 'no pet' covenants in these three countries. My findings show that pet-owning tenants in the UK experience the same problems of low availability and poor quality of pet-friendly housing as their Australian and Canadian counterparts. There is the same ambivalence shown by landlords and letting agents and the same sense of a tenant's powerlessness in negotiations with the landlord. In focusing on the mental health of tenants, my research shifts the focus from a tenant's sense of 'home' (the focus of Power's research) to the wider harmful effects of 'no pet' covenants on the lives of tenants which will be of particular relevance when analysing the law in Portfolio component 5.

Figure 10 – Map showing the links between the themes from tenants’ experiences of ‘no pet’ covenants



5.4 Section 2: Narrative Analysis

My approach to narrative analysis drew upon the narrative research pedagogy of Mishler (1995), Riessman (1990; 2000; 2008) and Thomas *et al* (2018). Four of my interviews were rich in narratives and I decided to craft four stories from the data (Savin-Baden, 2004): a story of sacrifice; a story of suffering; a story of loss and a story of stealth. I use a 'content-holistic' form of narrative analysis (Lieblich *et al*, 1998) to identify themes that allow me to read the data holistically, cognisant of context, complexity and temporality as well as the role I play in generating and analysing the data (Elliot, 2005). I identified a number of themes and each story together with their themes were then sent to the relevant research participant for comment. Thereafter, I met face-to-face with three of the participants to discuss my interpretation of their experience. This second meeting, one year after the initial interviews, enables me to acknowledge the temporality of experiences (Bell, 2011) and strengthens the trustworthiness of my evidence (Polkinghorne, 2007). Many of the themes I identified in my narrative analysis have already been discussed in depth in the previous section on thematic content analysis. Therefore, this section only includes the *additional* understanding that emerges from narrative analysis.

5.4.1 Bob – A story of sacrifice

Bob is an 89-year old man who lives in a privately rented one-bed bungalow in the North West of England with his 12-year old dog, Darkie. Bob moved into the bungalow in 2017 after being threatened with eviction from the Scottish care home where he had lived for four years. He was served with an eviction notice saying that he must give away his dog for rehoming or be evicted. A group of people took up Bob's cause and a petition on change.org amassed over 270,000 signatures. Bob's predicament was reported in the local newspapers and on the BBC news and attracted a protest outside Parliament but even so the manager of the care home would not change her mind. Bob's health was adversely affected by all the stress caused by the threat of eviction (he was not sleeping or eating well and he had unexplained pains) so he reluctantly decided to move into a bungalow 20 miles away from the care home after the owner contacted him and offered to lease it with permission for Darkie to live there.

Bob and his wife Margaret were married for 57 years having known each other from childhood. They never had children although they would have liked children. "*Aye, worst luck, aye, we would have liked children but it never happened*". Not long after they married, they bought a puppy, a corgi, which lived with them for 15 years. That was their only pet before Darkie. Bob worked as a farm labourer and Margaret (who grew up on a sheep farm

and loved dogs) worked in a mill and later she ran the village shop. In his early 40's Bob suffered a heart attack and was told by the doctor that he could no longer work as a farm labourer. He got a job working with a seller of farm machinery. After he retired, he continued to help out there until he had an aneurysm in 2000. He almost died (in fact he was clinically dead at one point) and had a 7-hour operation. He survived but was left with no function in his kidneys so has had dialysis for the last 19 years. The hospital suggested he get a dog to help improve his physical exercise: *"it was after I started to go to the hospital that they suggested we get a dog for to take me out for a walk sometime you know"*. One of the nurses said *"I think you should get a dog and to go on walks and good company for you both."* Aye, of course Margaret was chuffed with that, aye, yes".

After Bob gave up his job as a farm labourer, they moved to a small town in Scotland and rented a house there for over 30 years. They shared a passion for bowling and spent most days at the bowling green. At various times they each became President of the bowling club, Margaret being the first woman to undertake the role. They knew many of the residents of the town and enjoyed a strong sense of community while living there.

Margaret became ill and they moved to the care home to give her the specialist care she needed. They choose somewhere that had a positive pet policy so they could keep Darkie with them. *"You see the manageress that was there when we went says "both you and Margaret and the little dog will be here for life" and then of course, there was a dust up and the manageress left and she works up at Aberdeen now but err, she was all in favour of the dog, in fact, she used to take him away because she had two black dogs of her own and she was, she was err dog daft and they used to get on well but then and she left of course it all changed, aye"*. Margaret died and Bob continued to live there until he got the eviction notice. Bob thinks it was to do with money rather than the dog: *"Well they said that I could stay on condition I got rid of Darkie but there was no way I was going to do that no but you see they were making rooms smaller adding bits on for to make more accommodation and err I had a fairly big room well they wanted me out because they were going to put the charge up that was all"*.

Bob describes his relationship with Darkie as *"Very strong. I couldn't part with him. In fact, I hope Darkie outlives me, yeah. That's my big worry, yeah, but if anything happens to Darkie he's to be cremated and he's going to be buried with us. Aye and if he dies after I'm gone I've said to my, them that's coming, that's looking after my business I want that little dog buried on my grave but it will have to be done very discreetly because I think maybe they'll get into bother I don't think they'll allow that"*. When asked about the benefits of living with Darkie, Bob says: *"Well company, good company for one thing and love, I love him and err I*

think he returns his love back, I'm sure he does, aye, I love my little dog". This is especially important bearing in mind how much he misses Margaret: *"life's been quite good but err I miss Margaret terribly"*. Darkie helps alleviate the sense of loneliness. Bob sees Darkie as a life-long commitment: *"I would class him as my best friend. I just hadn't the heart for to part with my lovely little dog. No, no, no, that little dog as far as I'm concerned is with me until either he goes or I go, yeah"*.

Caring for Darkie is a big part of Bob's daily routine, for example, letting him into the garden, feeding and brushing him. Darkie acts as a social lubricant both in the care home (with the other residents who all liked Darkie) and when Bob moved into the bungalow in a new town he didn't know. I witnessed this first hand after the first interview, which took place in Bob's home, when we went to a local café. Several strangers approached Bob to talk to him about Darkie and he was really pleased to have the opportunity to talk to local people. In addition to the chance to talk to strangers outside, a number of dog walkers (volunteers with the Cinnamon Trust) visit Bob at home during the week to walk Darkie so Bob gets the benefit of interaction and conversation with these people: *"she's very good, very good indeed aye and her mother sometimes comes and we'll have a nice blather you'd say and err no I've been very, very fortunate in getting people for to come and take the dog"*.

5.4.1.1 Additional understanding of Bob's experience from a narrative analysis

Bob's story of his experience of 'no pet' covenants is a story of sacrifice. The word sacrifice means,

"surrender of something of value as a means of gaining something more desirable or of preventing some evil" (Collins English Dictionary).

He surrendered his comfortable home in the care home where he had security, support, friends and practical everyday care such as meals *"as a means of gaining something more desirable"* that being the continuance of the close social relationship he shared with his dog, Darkie. He valued the relationship he shared with Darkie more than his home. In trying to understand why he made the sacrifice to move home (which at 87 years was a stressful upheaval to his life) something struck me; he had made a similar sacrifice for his wife, Margaret, several years earlier. This only came to me during the second interview when we discussed the story I had crafted from his initial interview. During this meeting, Bob talked about this episode in his life in detail (previously he had only mentioned it in passing). When Margaret became ill she moved into a specialist care home. Bob and Margaret had been very happy in the home they rented for over 30 years near the bowling green where they spent most days enjoying their shared passion for bowling. They knew many people and enjoyed being part of the bowling community. Bob said he regretted leaving this home but he

moved to be with Margaret. He surrendered a home and community he loved to continue to live with Margaret. Having once surrendered his home for Margaret, he later did it again for Darkie. What does this tell me about his relationship with Darkie? During the second interview he said,

“The little dog fills Margaret’s shoes to a certain degree. Not exactly”.

He explained that Darkie was a “*great help*” in alleviating the loneliness he felt now that Margaret was gone. It was clear that Bob feels lonely living in the bungalow; having lived there for two years, he still does not know any local people even his neighbours. However, Darkie does more than provide companionship to alleviate loneliness; he is a final link to Margaret. Bob and Margaret were married for 57 years and, being unable to have children, they focussed on their relationship as a couple and were very close. She knew and loved Darkie and the three of them shared a life together before her death. There is a complexity present here that is indicative of a dynamic, reciprocal and social relationship between Bob and Darkie that is intertwined with Bob’s relationship with Margaret. Darkie is the final link with Margaret (McNicholas, 2014; Fox and Ray, 2019) and this is pivotal in understanding why Bob gave up his home to live with his dog.

In our interviews, Bob never used the word ‘family’ to describe Darkie. Whenever I asked him about family he always talked about not been able to have children,

“I would have loved to have a family”.

He called Darkie his ‘companion’ and ‘friend’. From knowing Bob’s background and history, I can understand his reluctance to use the word ‘family’ for a dog. He was bought up by his grandparents, and his grandfather (who died young) was a shepherd. His father-in-law was also a shepherd, as was Margaret for a time, and Bob worked as a farm labourer for most of his working life. Therefore, he is used to seeing dogs as working dogs on a farm and this is likely to shape his perception of dogs. While he can accept dogs as pets that live in the home, it is a giant leap to see them as family so he calls Darkie his ‘companion’. However, looking behind the label Bob chooses to describe their relationship there is a closeness that others could describe as familial. Darkie is part of the everyday practices in the home, such as sleeping and eating, and is a social agent who influences routines and decisions. Significantly, Bob is concerned that Darkie is laid to rest with him when he dies. At our second interview, Bob talked at length about the arrangements when he and Darkie die and has even met with a vicar specifically to discuss this. If Darkie dies before Bob, he will keep Darkie’s ashes and arrange for them to be laid beside Bob when he dies. If Darkie dies after Bob, a cousin has agreed to lay Darkie to rest on Bob’s grave. Bob is almost 90 years and Darkie is 12 years so it is understandable that Bob thinks about death. The fact that he

worries about Darkie being buried with him is indicative of a very close relationship that could be seen to be closer to family than friendship. This suggests that giving a pet owner a survey and asking them to tick a box if they see their dog as (A) a family member or (B) a companion, may be misleading if you are seeking to understand the nature of the relationship the person shares with their dog as opposed to the label the person gives that relationship. Some people, like Bob, may be reluctant to call their dog a family member but when the nature of their relationship is examined, it indicates a close relationship similar to that of human family members.

At our first interview, Bob told me a story about his uncle's dog:

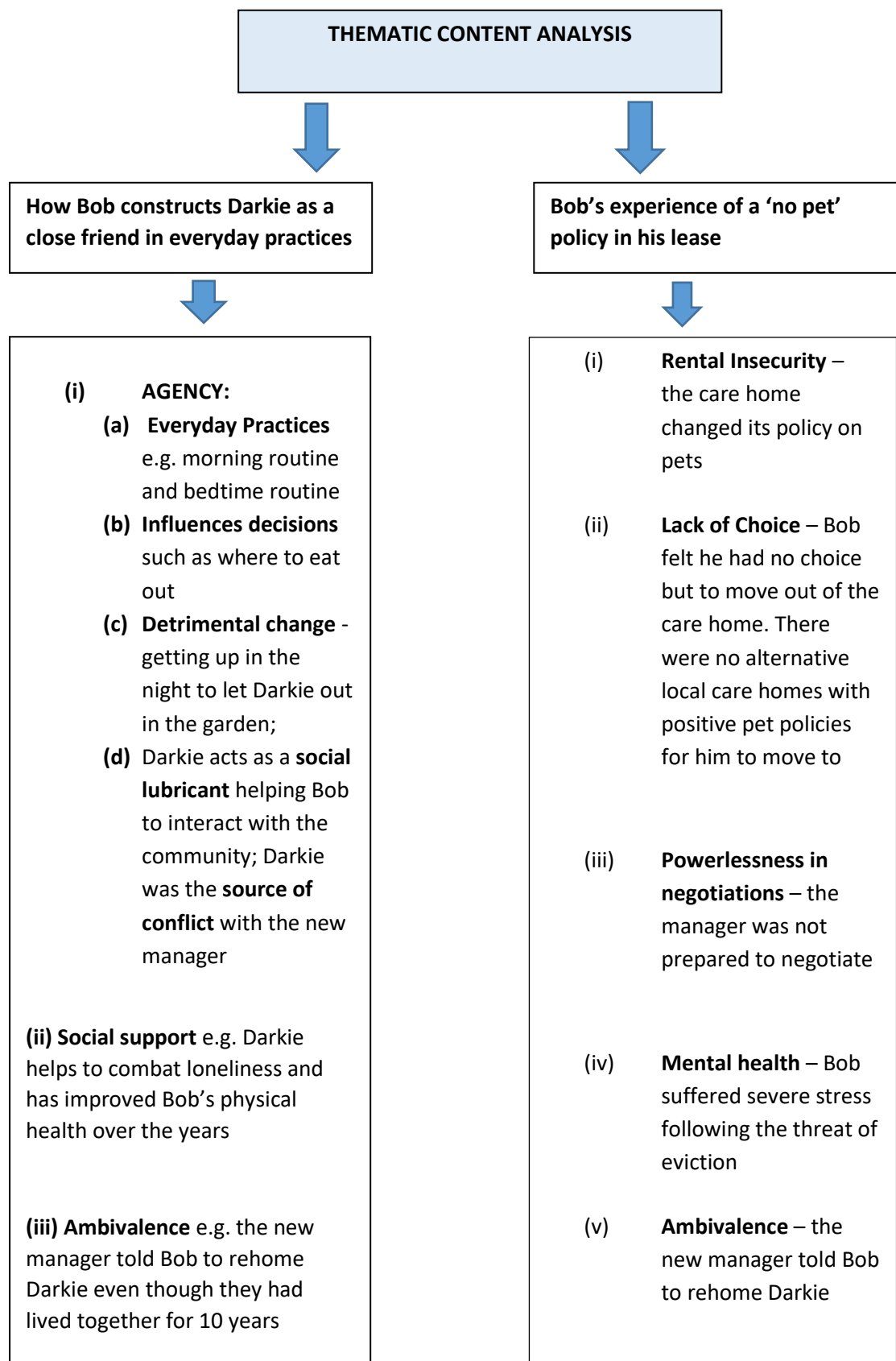
"Well I had an uncle, he was a shepherd and he sold an old dog and it went away ... this little, this collie it went way up away up above Lockerbie I would have said it must have been about, I'd have said thirty mile away way out in the country and err it was an oldish dog it was, you know, by working on the hill and this farmer had got it away above Lockerbie and one night through the night he heard this whimpering noise and he went to the door and here was the old dog with its tail wagging come all that way back and it went in the dark. Now how did that dog find its way back? aye and the farmer wanted it back and Tommy says "Oh no" he says "if that old dog was that fond of me" he says "there's no way I'm going to part with him now", aye".

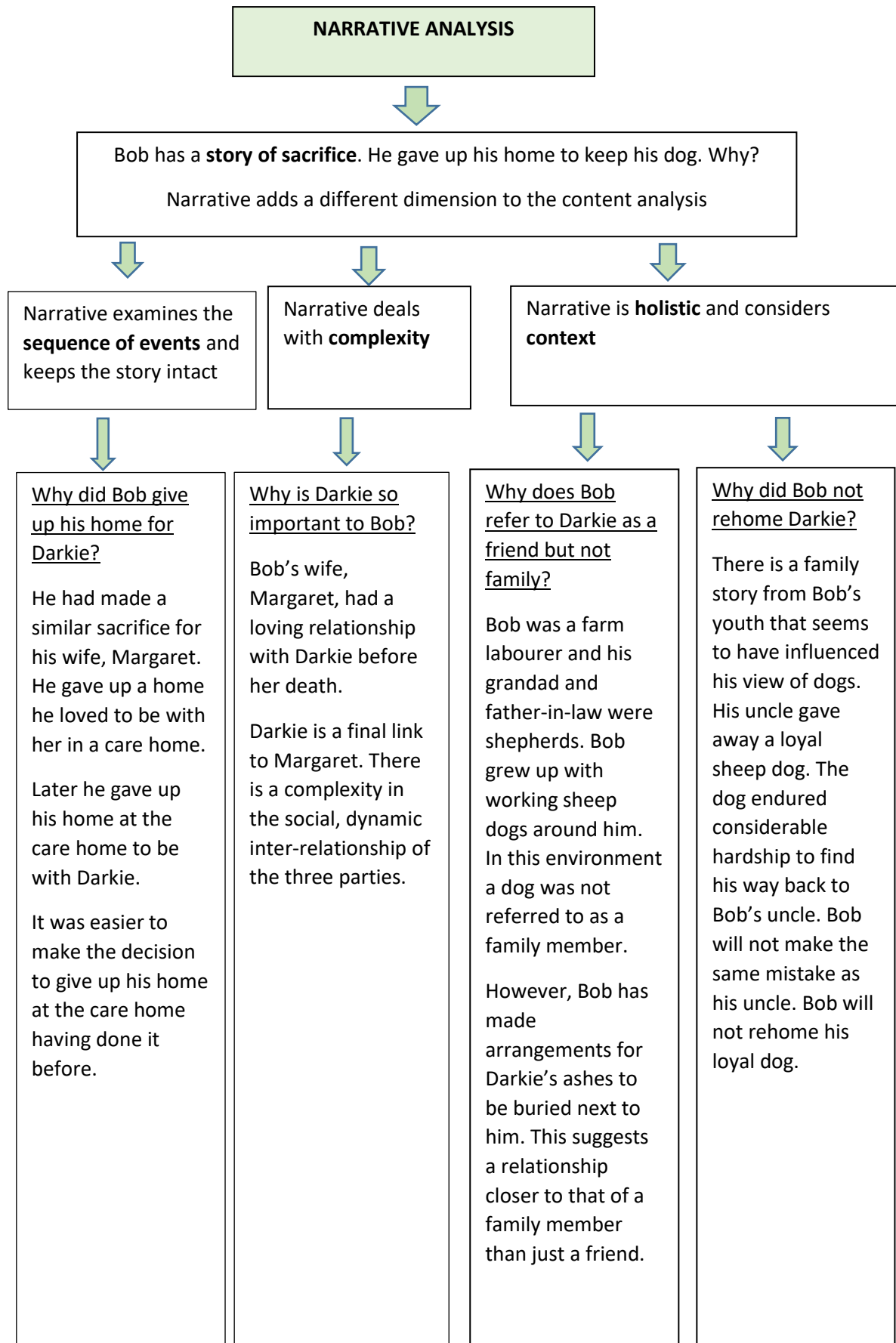
Bob told me this story twice (at the initial interview and at the follow up interview over a year later) which made me realise the significance of the story. Each time it was in the context of why he gave up his home to live with Darkie. The story of the uncle's dog is not about Darkie but it tells me about how Bob sees dogs – as loyal, trusting, determined and intelligent. His uncle made a mistake of giving away his dog to another farmer. The loyal dog returned on his own accord and the uncle vowed never to part with the dog again. This story from Bob's youth is important to him and he remembers it after many years. He will not make the same mistake as his uncle. He will not give Darkie away,

"because he shows his love as much as I give him yeah, yes. No, he's a, he's a super little dog, no, no but err, friendship's a big thing you know, with a dog".

Bob's experience of 'no pet' covenants is a story of sacrifice. It tells of the strength of the bond between an owner and his companion animal but also of its nature as a dynamic, reciprocal and social relationship that can be intertwined with human-human relationships between the owner and others, often family members with whom they live. It tells of the life-changing consequences of 'no pet' covenants/policies that can force an owner into giving up their home for the sake of their relationship with their companion animal.

Figure 11 - The different themes arising from using content and narrative analysis: Bob and Darkie





5.4.2 Kate – a story of loss

Kate is married with two children. The family live in Scotland. At the time of the initial interview her daughter was 7 years and her son was 4 months. Kate's experience of 'no pet' covenants was traumatic because it involved the loss of her two dogs, Roxie and Honey, whom she viewed as "*extra family members*". She said "*we just thought of them as extra kids*". Her sense of loss and grief motivated her to write to her Member of the Scottish Parliament (MSP) to complain about the use of 'no pet' covenants in leases.

In 2014 Kate, her husband, Lewis, and young daughter, Jess, who was 3 years at the time, moved into a rented house with a garden. Previously they had rented flats and lived several storeys high so when they rented the house with a garden they saw having a dog as "*just a natural thing*" to do. Both Kate and Lewis had grown up as children with dogs in the home and wanted their young daughter to have that experience. They researched the type of breed they wanted (a Staffordshire bull terrier) to make sure it was safe with young children and in late 2015 adopted a puppy from a rescue centre. It was a thorough adoption process that involved time and money (including agreeing to have the dog spayed and undertaking a course of puppy classes). Kate referred to the seriousness of the decision to adopt Roxie, "*It was as serious a decision, in my opinion, as having another baby*". Honey, a Labrador, came to live with them by a very different route. She belonged to their neighbour and because he worked at weekends, he asked Kate to look after Honey from Friday to Sunday night. After a while, he asked if she would adopt Honey full time because of his work and family commitments. Kate said the decision was "*just a no brainer*". Honey was 5 years old when she went to live with Kate in early 2016.

The dogs "*immediately connected with each other*". Honey was a gentle and "*natural motherly dog*" and was very tolerant of the younger, Roxie, who was very excitable and more domineering. Both Kate and Lewis acknowledged the special character of Honey that was almost humanlike. "*Honey was more human than I've ever seen a dog*" describing her as a tolerant, gentle giant who loved being with people and seemed to understand every word said to her.

Over the 3 years she lived with them, Roxie developed a particularly close bond with Kate's young daughter, Jess. Describing their relationship Kate said, "*they were just inseparable*", "*they were each other's shadow really*". Jess talked to Roxie "*like a person*", "*you would frequently hear her chatting to [Roxie]*".

The dogs were part of the everyday routine of the household. The average day started by letting the dogs into the garden before breakfast and after Jess had gone to school the dogs

would go for long walks usually with Lewis sometimes lasting several hours. In the evening Roxie liked her own space and went to her bed, which was in a utility room at the back of the house, but *“Honey would sit beside you on the sofa or lie on the floor by your feet”*. At night the dogs did not sleep in the bedrooms because Jess was quite young and Kate felt it best to keep the dogs downstairs at night.

The dogs supported the family in a number of ways. Kate felt secure knowing the dogs were guarding her, *“I felt completely safe all the time”*. Referring to Roxie, Kate talked of *“her usual stance with me, very guarded, very sort of protective ... when I was first pregnant with the baby she used to sit with her paws across my tummy on the sofa”* and Kate was used to Roxie *“guarding me just making sure no one’s coming up to the front door”*. Kate acknowledged the ways the dogs improved her and Lewis’ mental health and well-being, helping to calm her anxiety and panic attacks *“They would just instantly calm me down”*. Lewis suffers from Post-Traumatic Stress Disorder (PTSD) and the dogs provided valuable support; sensing when he was low, *“they wouldn’t leave his side at all”*. The dogs helped provide a sense of daily routine and purpose for Lewis because he knew he was responsible for walking them each day.

From 2014 to 2018 they lived in the rented house with the garden where the landlord allowed pets with consent. They had regular housing inspections and no concerns were ever raised about the two dogs. In January 2018 Kate and Lewis received a notice to quit the property giving them eight weeks to leave. This was a no-fault eviction permitted under the law. Kate felt *“panic”* because eight weeks *“seems like a really long time but it’s not really, not when there isn’t really any housing in the area”*. They immediately went to see the council as they feared they would be made homeless but the council *“couldn’t give us an appointment to just speak to someone until 10 weeks later”* which was too late so they had no choice but to look for a private rental. There was a sense of urgency because the first house they found in the area *“was just snapped up”* the morning they were due to see it. They found a house but felt *“this was our last resort to keep our daughter in the area, with her friends, with her school”* so they chose not to mention the dogs to the agent. Kate justifies the concealment on the basis of the sense of urgency and pressure she felt, *“we were under so much pressure to move and we had so little time left ... I suppose on our part we should have maybe mentioned the dogs straight away but we didn’t because, well we thought ‘they’re no trouble, what harm are they going to do?’ So we never mentioned it to the agency”*. Kate knew the dogs had caused no problems in the previous house so could not foresee any problems in the new house especially as it was unfurnished and there were no downstairs carpets. What harm could the dogs do? There was a rigorous process to be accepted as a tenant including a credit check, references and providing a guarantor.

The family moved into the house in March 2018 and lived there with the dogs for two months with no problems. Then in early May they received an email from the agent saying a neighbour had complained about a barking dog. Kate knew it was not Honey or Roxie as they rarely barked but she had to admit to the agent that she had dogs living in the house. The landlord, who lives in Surrey, insisted that the dogs were rehomed as soon as possible. She said that her husband *“was highly allergic to dogs”* so she did not want the hairs to become embedded in the wooden floors. Kate suggested the agents come and meet the dogs to see that they were not causing any damage to the property and she also offered to pay a pet deposit *“but nothing was good enough ... We did get told that the landlady sympathised but that it was very clear in the lease that they didn’t want pets”*. Kate and Lewis now had a difficult choice. Did they keep the dogs and find somewhere else to live or rehome the dogs and stay in the house? They soon realised that there were no other rentals available in the area so if they kept the dogs they would have to move away from Jess’s school and friends and from their work. *“There was just nothing in the area. There was nothing to rent and nothing coming up to rent.”* They made the difficult decision to rehome the dogs. Sadly Kate felt under pressure to rehome them quickly, *“I tried to get them rehomed together but they just put me under so much pressure that they just had to go and we had to separate them, which was worse for them as well because they’d both been together for as long as they have”*.

Honey was rehomed through Kate advertising on facebook. A family friend, who lived nearby with his two dogs, contacted Kate offering to foster Honey until she could find somewhere else to live with a pet friendly policy. She told him there was nowhere else to move to in the area so Honey needed to be rehomed, so he agreed to meet Honey to see how the three dogs got on. That evening Kate *“walked her just down to the river and she met his two dogs and they all clicked immediately which I knew they would, they’d be fine. So he and his wife just completely fell in love with her straight away”*. Honey went to live with them and *“she’s absolutely loving it”*. Kate keeps in touch with the couple so she knows how Honey is, *“We talk regularly and they send me photos”*.

With Roxie, the rescue centre where Kate got her from were involved with the rehoming and found a family for her. The new family had a daughter the same age as Jess. The family came to visit to meet Roxie and Kate asked them to take her away immediately so as not to prolong Roxie’s distress, *“we can’t drag this out anymore because Honey had already left three days before so Roxie was here by herself and she was getting really, really confused. She was pining”*. Roxie is happy in her new home and the owners keep in touch, *“Roxie’s quite happy in her new family as well. They keep in regular contact too”*. For Kate it is really important that the dogs are happy in their new families and that she receives reports about

them, *“It’s quite nice to see how they’re both getting on as well and to know that they’re being really well looked after which is good, you know, because I wouldn’t have, I just would have refused to give them up if I had to do it through someone I wouldn’t have known forever. So they would have had a bit of a fight on their hands”*.

When the dogs left, the family were upset at their loss *“I was really upset and Jess was really, really upset”*. When Roxie left, Jess was *“distraught. She cried for most of the evening”*. Jess has a photo of the dogs in a frame in her bedroom, *“she’ll always have that connection with them”*. The bond Jess has with Roxie outlasts the period of the pet ownership. At the time the dogs left, Jess was only 7 years and could not understand why the dogs had to be rehomed. To Jess the house was their home so why couldn’t the dogs live with them? *“She thinks that this is our house. She’d go ‘what do you mean, we’re not allowed to have the dogs? But we own this house, we live here. This is our house’”*. It was hard for Kate to explain this to Jess.

Following the loss of the dogs, Kate wrote to her MSP to highlight the injustice she had experienced due to the ‘no pet’ covenant.

5.4.2.1 Additional understanding of Kate’s experience from a narrative analysis

A few days before Kate and I met in a cafe in Edinburgh (in June 2019), I emailed her a copy of the story I had crafted from her interview. The meeting was an opportunity to talk through her story and discuss the themes I had identified. She was happy with the story and the themes but the meeting gave me the opportunity to dig deeper to better understand her experience of ‘no pet’ covenants especially the reason why she gave away her dogs whom she viewed as family members. From the time of the first interview, I felt there was an inconsistency in Kate’s story because she said the dogs were *“like extra kids”* yet she gave them away. How could this be reconciled? Using narrative analysis to analyse the data with the sequence of events intact and taking context into account, the idea of the ‘hierarchical ranking of family members’ reconciles the concept of dogs as family with giving the dogs up for rehoming. This is not an example of the ambivalence to animals that Shir-Vertesh (2012) witnessed with some of her participants who rejected their dogs once they had a human child, because Kate and Lewis would have put the needs of the dogs before their own needs and would have moved to a different area or moved into a hostel rather than relinquish the dogs. However, they had two young children and they prioritised their children’s needs over the dogs. The dogs were part of the family but on a hierarchical ranking of family members, the dogs were lower than the children. On the question of where to live, Kate and Lewis would put the dogs’ needs above their own needs but the children’s needs above the dogs’ needs. The sequence of events is crucial in understanding the act of rehoming the dogs.

Kate says she was breastfeeding her 9 week old baby at 2am on a cold day in January when she first read the email from the letting agent telling her that the landlord wanted to sell the house and they had 8 weeks to move out. Kate said she felt immediate panic,

“it felt like someone had put a hand around my throat”.

She started looking for houses straight away but there was nothing available. The first house they were due to view was “*snapped up*” before they could see it, heightening Kate’s sense of urgency and panic. Understanding the context of her decision to rehome the dogs is important. She had a new baby and with that a strong protective need to provide a stable home for the baby. She had a 7-year old daughter settled at school whom she did not want to uproot.

Kate said the decision to rehome the dogs was “*really difficult*”, “*something we had to weigh up on all sides*”. One factor to weigh was the possibility of finding good homes for the dogs so they would continue to have a happy life with new owners. Kate is making an assumption here that a dog can be happy with a new owner. She had not grown up with the story of an Uncle’s loyal dog - a story that played a part in Bob’s decision to keep Darkie. Bob sees a dog as being loyal to its owner so the dog will return to the original owner if it can. In contrast, Kate felt that a dog can have a good life with a different owner, Honey showed that this was possible having previously lived with their neighbour. It was important to Kate that she found the right home for the dogs and one that would remain in regular contact with her,

“I just would have refused to give them up if I had to do it through someone I wouldn’t have known forever”.

Narrative analysis helps to understand why Kate and Lewis chose to conceal the dogs from the letting agent. The sequence of events and context are both crucial in understanding their decision. The fact that Kate had a baby, felt panic at the lack of available rental property and felt a sense of urgency as the 8-week period before their eviction was passing quickly.

Ultimately, her decision to remain silent about the dogs even though there was a ‘no pet’ covenant in the lease was because she undertook a harm assessment. She knew about the ‘no pet’ covenant but she said that all rental houses said ‘no pets’. In Kate’s mind the ‘no pet’ covenant was just a standard term of the lease which would only be called upon in a situation where a dog caused a problem in the house such as a nuisance to the neighbours. She already knew that Roxie and Honey were well-behaved dogs in the house and would cause no damage to the property nor nuisance to any neighbours. Kate could see no harm to the landlord in having the dogs in the house especially as the house was unfurnished and there were no carpets. Kate did not know that the owner’s husband had a severe allergy to dog hair but as the landlord and her husband lived in Surrey and the house Kate rented was

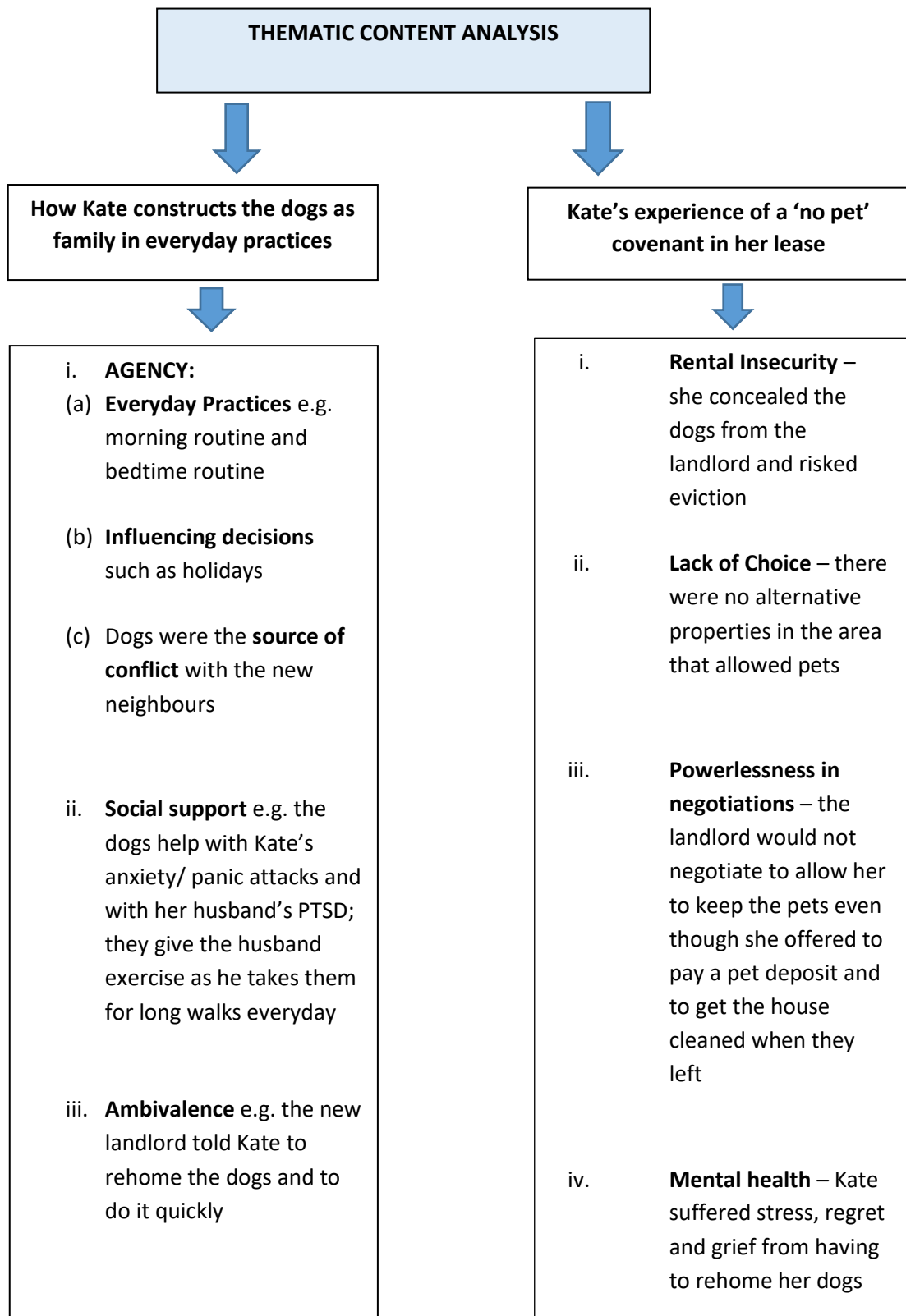
in Scotland it may not have changed the outcome of Kate's assessment of the harm of keeping dogs in the property in breach of the 'no pet' covenant.

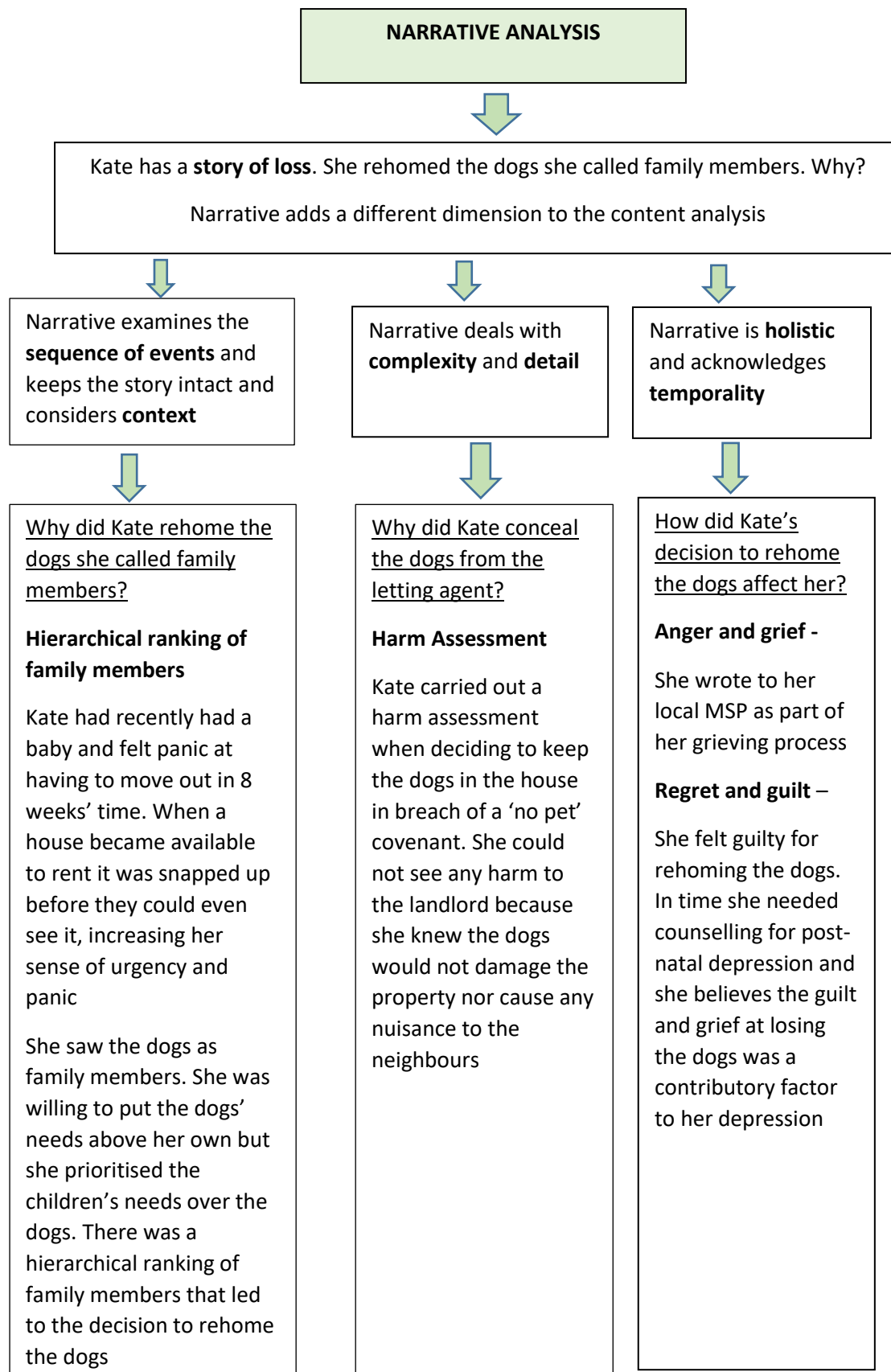
Meeting with Kate almost one year on from the initial interview gave me the opportunity to consider how her decision to rehome the dogs had affected her personally. Kate admitted that it has been a hard year. She had just finished a course of counselling for post-natal depression, which she says was made worse because of the dogs leaving. She struggled with regret and guilt over her decision to rehome the dogs. She felt it

"was like giving a baby up for adoption".

She still cannot let go even though more than a year has passed. She needs to know the dogs are doing well. In October 2018 (about 7 months after she had rehomed the dogs), Honey became very ill. The new owners contacted Kate who rushed to the vets to be with Honey as there was a chance she would die. Fortunately Honey made a good recovery but the fact that Kate dropped everything and rushed to the vets to be with Honey even though it was 7 months after she had rehomed the dog, demonstrates Kate's inability to let Honey go. Kate said she felt guilty for their decision to rehome the dogs and the week before Roxie left (Honey had already left by this time) she and Lewis sat each night on the sofa crying and stroking Roxie, apologising to her for what was about to happen. Jess still misses Roxie, even after one year has passed. She still has a photo of the dogs in her bedroom and she asks to visit Roxie. Kate said her motivation for writing to her local Member of the Scottish Parliament (MSP) was grief. The loss of her dogs caused her grief (Charles, 2008; McNicholas, 2014; Redmalm, 2015). Taking some form of direct action (in the form of a letter to her MSP) was part of her grieving process and helped her cope with the sense of regret and guilt associated with that grief.

Figure 12 - The different themes arising from using content and narrative analysis: Kate, Roxie and Honey





5.4.3 Julia – a story of suffering

Julia is retired and currently lives alone. Originally, from a Northern City she moved south to be near her son. When she first moved south, Julia lived in a two-bed house rented from a Housing Association with a positive pet policy. She lived there with her sick mother and a number of dogs. After her mother's death in 2011, she continued to live there and by this time had only one dog, Annie, as her older dogs had died.

In 2015 she gave up her tenancy with the Housing Association to move into an annexe of a large house in the countryside that was owned by some friends. She paid £650 per month for the annexe, however, the council served an enforcement notice on the owners because they were not allowed to privately rent the annexe and Julia had to leave. She used [sparerooms.com](#) to find private accommodation that would accept Annie. She moved into a “shed in a garden” (with use of a shower in the garage) which she described as “awful” but she took it because “*beggars can't be choosers*”. After six months, the council found out and served a notice on the owner to stop renting out the shed. Next, she moved into a garage for four months because it was pet-friendly and there were no alternatives. She described the garage as “horrific” but once again the council found out and served a notice on the owner. She went to the council for help but because she had not lived in the borough for the requisite length of time, they had no duty to house her. They told her to rent privately and when she explained that it is difficult with a dog, they told her to “*get rid of your dog*”. This was not an option for Julia.

Julia “*tried everything*” to find a pet friendly property. She realised that landlords are taking advantage of pet owners desperate to keep their pets and forced to take substandard property:

“I went into the room and I could see this lean-to and there was a single bed in it but it went through to the garden and the door was open so she said “yeah I’ll show it to you.” She wanted £500 a month and I said “Where is it?” and she went “there” and I said “but you’re all walking through to the garden” and she said “yes but you can lock it at night” and I said “where’s the bathroom and that?” and she said there’s a little downstairs toilet and a basin there” and she wanted 500 quid so I started to realise that these were the people that were really, they were dodgy because they weren’t doing anything. They were just saying “oh she wants to keep her dog.”

Luckily, a flat in council owned sheltered accommodation for older people became available and as Julia was on the list, she was offered the flat. Given her bad housing experiences over the preceding year and the limited options available to find a pet friendly property she

felt desperate to accept the council flat *“when I drove to look at it I thought ‘I don’t care what it’s like, where it is, I can take the dog’”*. However, when she arrived at the flat she discovered there was a mix up because dogs are only allowed in the ground floor flats and this was a first floor flat. Julia was ready to leave but the manager agreed that she could keep Annie in the first floor flat on condition that when Annie dies, Julia will not have another dog in the flat. In her desperation Julia accepted this arrangement *“and because I was clutching at straws I went ‘yeah, yeah whatever’”*. After a year and two months in the council flat Annie died (aged 12.5 years) and Julia faced the prospect of living without a dog for the first time in her life.

Julia has always lived with dogs – both as a child and as an adult. She had also worked with dogs for all her working life. Her first job was at a boarding kennels when she was 18 years old. After that other jobs included working for a dog food company, dog grooming, teaching dog grooming, breeder of specific pedigree breeds, home boarder for dogs, working at Crufts and other championship dog shows and working at a Dog’s Home in a City. Dogs have been a huge part of Julia’s life so the prospect of living without a dog had a massive impact on her.

Living with Annie, and meeting her welfare needs, was a big part of Julia’s daily routine. Losing Annie, and being denied the opportunity to keep another dog, creates a major disruption to Julia’s daily routine and interrupts her sense of stability. She used to walk Annie several times a day but now she feels no motivation to walk. *“I’ve said this to the housing officers and I said ‘because I’m in sheltered accommodation now which is age specific will I ever get out of here?’ because I feel entombed and that is the word I choose to use, when I go in to that flat now I feel entombed because I have no motivation to come out of it”*. Julia feelings are raw and she admits she is struggling with her grief: *“I don’t mind bringing mental health in because you know what, I feel on odd days that I’m going to crack, I’m going to break and then it plateaus for a bit. But I don’t think I’m dealing with it very well because as I said I feel this brick...on one occasion after Annie died I cried and my neighbour beneath me said ‘I heard you crying last night’ and that totally inhibited me so I get in my car and I cry and I scream and I rant and then I get out of my car and if I pass someone I go ‘Hello.’ Because I don’t know how to grieve, you know, I don’t know how to grieve”*.

Julia describes her need for a dog as an emotional need and likens it to an invisible disability *“when they say not all disabilities are visible, they actually put that on disabled toilets now because obviously people look at people and say ‘you’ve just gone in a disabled toilet and you’re okay’ and I looked at it and I thought ‘but not all needs are physical needs’. My need is - it is an emotional need. I love walking but there is no way I’d walk along here on my own”*

in the evening like I did with the dog, go in the woods. No way I would go in the woods on my own. So all the things I enjoyed doing I won't do anymore". Julia feels frustrated that the landlord doesn't understand her need for a dog *"nobody's going to listen and say I need to go into a ground floor flat because I want a dog. Their attitude is "Tough" you know and as a dog person I don't get it"*.

The 'no pet' covenant denies her a sense of choice. She feels that she has no choice: *"I need to get myself in a position of strength where I can get a dog on my terms not because some pen pusher has said "oh go on then but don't get a big one" because that's the other thing 'don't get a big one'. I would like a German Shepherd and my right's gone. I grew up with German Shepherds ... It's that, it's choice. I feel like that part of my life where I have choices are over and gone unless I get out of there"*.

Annie provides valuable support, *"I probably off loaded on the dog when I was upset or if I wanted to rant about something without this particular dog ever being anything but constant in her temperament so if I cried she nudged my arm"*. She connects Julia with the community by facilitating conversations with others, demonstrating Annie's role as *"Social Capital"* (Charles and Davies, 2014).

For Julia an important facet of her relationship with Annie is trust because she has *"trust issues"* with some people. Annie was a placid dog with a calm temperament and Julia trusted Annie even with her sick mother and her young granddaughter. Julia's mother had dementia and Annie's calm presence through this difficult time was important to Julia.

The relationship Annie has with Julia's son and granddaughter is important to Julia: *"it was the relationship between them because from being born that dog was rock solid with [granddaughter], I mean absolutely rock solid"*. Annie is part of Julia's inner circle of close relationships that encompasses her son, her granddaughter and her dog: *"My inner circle would be my son, [granddaughter], Annie because we spent...I mean, she was always with me"*. Time spent together seems to have been a key factor: *"we just went everywhere together"*. Her son's partner did not relate to Annie and excluded her from their house and tethered her in their garden creating a source of conflict between her and Julia. Annie's death appears to have been a catalyst for her son's separation from his partner due to her coldness to Julia at that difficult time. It was an acrimonious split and the partner stopped Julia from seeing her granddaughter for a while which was very difficult for Julia.

Talking about her relationships with others made Julia realise that how she related to other people was influenced by Annie: *"it's weird because it's making me think now that I'm actually judging my friends on the people that accepted me with Annie and the people that didn't"*.

Julia is not sentimental and never thought of Annie as a 'fur baby'. She describes herself as a 'black and white dog owner' who saw Annie as a hound dog and gave her appropriate boundaries. Even so Julia saw Annie as "*my mate*" and enjoyed her companionship and "*unconditional love*". The relationship with Annie meant that Julia was prepared to change her daily routine to her detriment to meet the changing welfare needs of Annie as she got older: "*I had to slow down because she was slowing down ... if she woke me in the middle of the night I got up, got dressed and took her out because I didn't want to compromise her*".

Julia wants to feel useful. She wants to foster and train a Guide Dog for the Blind puppy and feels that she has ideal credentials for the role given her long career working with dogs. She is applying to the council for a ground floor flat so she can foster a puppy and explains "*the reason I want to do this is for my mental health as well, make me feel a useful member of society again. I can give something to society with a guide dog*".

Julia has her own ideas about how to resolve the issue of 'no pet' covenants. The underpinning assumption is that a relationship with a living, sentient being is more important than bricks and mortar: "*I don't care if somebody's got a ratty Jack Russell and they love it to bits and it's their life why should they be made to either end that dog's life or get rid of it because of stupid rules? It's only a place to live isn't it?*". Having prioritised the loving relationship people have with their dogs over the landlord's property rights, she suggests that the way forward is to have a dog owner's code – a list of rules which permits responsible dog owners to live with their dogs: "*The way forward that I'd like to see with councils and housing associations is to have a code of ethics for dog owners, rules one to twenty, obey them and you can have a dog or a cat*". This would allow landlords to deal with antisocial behaviour and irresponsible pet owners whilst allowing responsible pet owners to live with their pets.

5.4.3.1 Additional understanding of Julia's experience from a narrative analysis

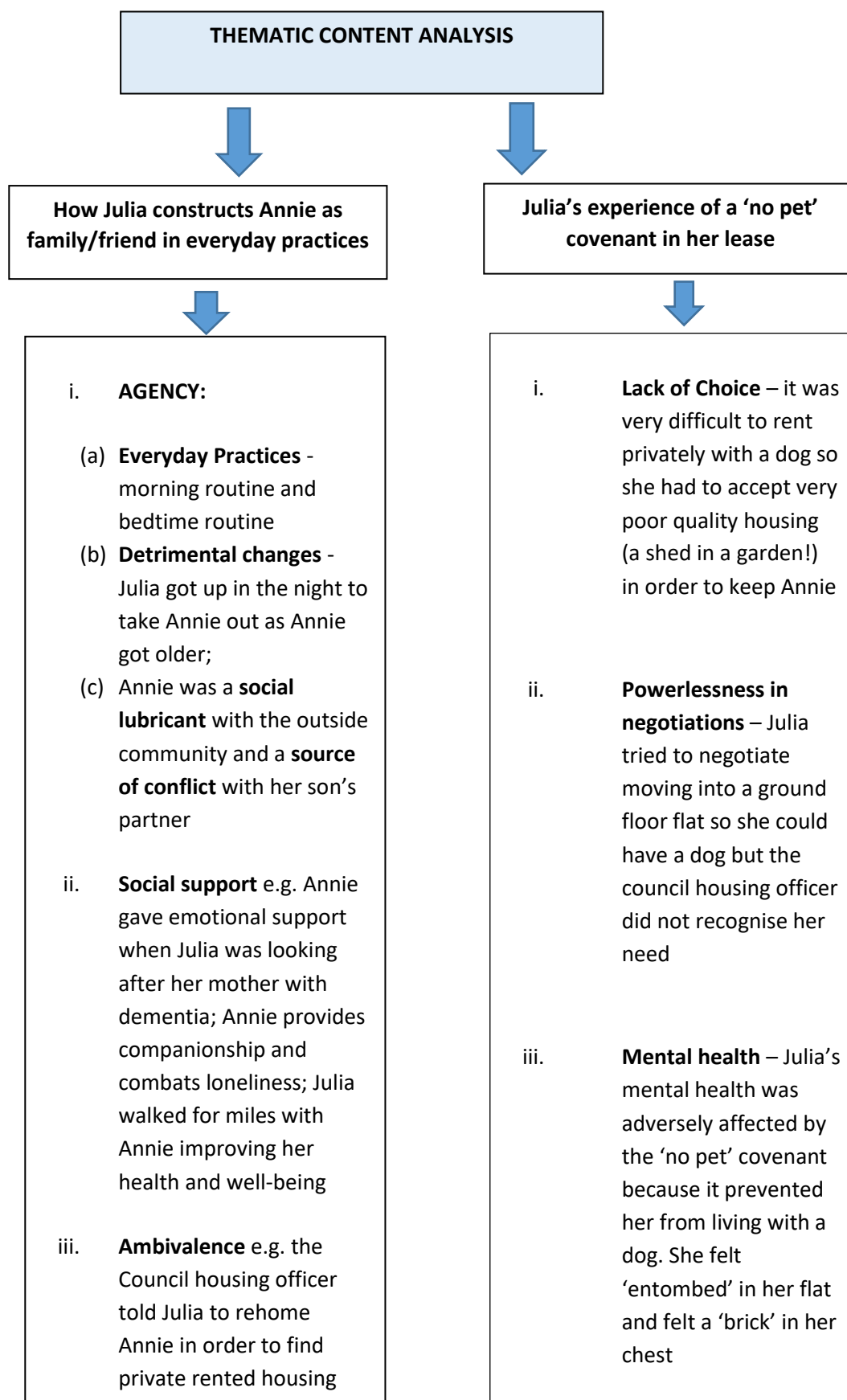
Julia's story is one of suffering. She cried during our first interview and spoke of her grief for Annie's death but her suffering was still evident over one year later at our second interview. There was emotion in her voice and eyes as she talked about her continuing grief (reflexive journal entry, September 2019). In the initial interview Julia spoke of her invisible disability, this being her emotional need for a dog and the presence of the 'no pet' covenant in the lease making her feel 'entombed' in the flat. The literature recognises the loss of a dog as "*grief*" (Charles, 2008, p.7.3; Redmalm, 2015) and "*bereavement*" (McNicholas, 2014; Fox and Ray, 2019, p. 211) and this is certainly Julia's experience. However, the sequence of events in her life is important in understanding how the 'no pet' covenant had such a devastating effect on Julia following Annie's death. Shortly after Annie's death, Julia's son

separated from his partner who then prevented Julia from spending time with her young granddaughter with whom she had a very close relationship. This was devastating for Julia and exacerbated the loss she felt from Annie's sudden death. The cumulative effect of Annie's death, the son's separation and the exclusion of her granddaughter meant that the negative impact of the 'no pet' covenant, in denying Julia the chance to live with another dog, was significantly aggravated.

Understanding Julia's past history also helps explain why the existence of the 'no pet' covenant was especially difficult for her to accept. She grew up with dogs as a child and worked with dogs all her working life from the age of 18 years. Having lived and worked with dogs all her life she had never experienced a day without some canine interaction and consequently the effect of the covenant left her feeling "*disabled*". At our second interview, Julia was still without a dog. She had moved into a ground floor flat but the absence of an enclosed garden prevented her from fostering a puppy for the Guide dogs for the Blind charity. Her lease permits dogs with the landlord's prior consent but her "*terrible fear*" of the landlord refusing consent was ironically preventing her from acquiring a dog.

Julia had a very close bond with Annie and although she never referred to Annie as a family member, she places Annie in her "*inner circle*". Her inner circle consists of her son, her granddaughter and Annie and therefore suggests that Annie is seen as part of her close family. Like Bob, Julia does not feel comfortable talking of a dog as a family member. This may be because of her background as a dog trainer and working in kennels. She was the only one of my participants to refer to 'pack' psychology and the need for dogs to understand and obey rules. However, when we look behind the label of 'companion' to explore the actual nature of the relationship between Julia and Annie, it appears to be closer to family than friend. She places Annie, together with her son and granddaughter as her inner circle, "*If I'm being totally honest my son, [granddaughter] and Annie were the only important things in my life*". The interlinking of relationships between the dog and other family members is important for Julia; the fact that Annie adores Julia's son and granddaughter and they in turn love Annie is relevant to Annie's status in Julia's eyes. She describes this interconnectedness between the four of them (Julia, her son, her granddaughter and Annie) as "*symbiosis*" with all being dependent on each other. This demonstrates the complexity of the human-companion animal relationship and the way this social and dynamic relationship links with other humans in the owner's life.

Figure 13 - The different themes arising from using content and narrative analysis: Julia and Annie



NARRATIVE ANALYSIS

Julia has a **story of suffering**. She lived in poor quality housing in order to live with Annie and was later denied the opportunity to have a dog because of a 'no pet' covenant in her lease.

Narrative examines the **sequence of events** and keeps the story intact and considers **context**

Why was Julia's suffering so intense after Annie's death?

Julia grieved Annie's death but the loss of Annie was intensified due to:

Having a 'no pet' covenant prevented her from getting another dog; and

The split between her son and his partner prevented her from spending time with her granddaughter. Annie's death was a catalyst for the separation and it happened shortly afterwards. As a consequence, Julia's access to her young granddaughter, with whom she was very close, was restricted.

Narrative deals with **complexity**

How did Julia view her relationship with Annie?

Symbiotic relationship interlinked with humans

Julia talked of Annie being a companion. She did not use the word family

However, she talked of her son, her granddaughter and Annie being her "*inner circle*". She talked of the relationship between the four of them being interlinked.

Narrative is **holistic** and considers the **history** of the participant

Why did the 'no pet' covenant cause Julia to suffer?

The existence of the covenant prevented her from getting another dog after Annie's death. Julia had always lived and worked with dogs from the age of 18 year. She lived with dogs as a child, throughout her working life and now in her retirement. She said she had never previously had a day without interacting with a dog. Knowing Julia's background and history helps explain why she is so adversely affected by the 'no pet' covenant in her lease.

5.4.4 Lucy and Josh – a story of stealth

Lucy and Josh, a young couple in their 20's embarking on professional careers, lived in a rented flat in the private sector with their cat, Simba. Their experience of 'no pet' covenants was one of stealth due to concealing Simba's presence from the landlord and having to adopt creative strategies to hide his presence during inspections of the flat by the managing agents. At the expiration of their lease, they chose to move to a pet-friendly property but experienced difficulties finding one in the relevant part of the North East.

Josh purchased Simba when he was a 7 week old kitten. His motivation for getting Simba was for company, *"when I got to Uni I just wanted a little bit of company so I decided to get him"*. Josh's Grandma had had cats as Josh was growing up so *"cats are my primary choice of pet"*. Simba seemed to trust Josh from the start and that was important to Josh because he knew it is difficult to get cats to trust people. This sense of trust between them is an important aspect of their relationship for Josh.

On a daily basis their morning ritual starts with the alarm and Simba runs in and sits on the bed and has some fuss until Josh gets up to feed him. Simba is assertive in asking for food, *"he'll be around my legs. He'll be meowing away, mainly fishing for snacks"*. As soon as Josh and Lucy return from work Simba is there to greet them, *"I'll scoop him up and hold him like a little baby because he seems to like that. It's like instant purr"*. In the evening, when Josh is playing games on the TV Simba stays near him on the sofa. When they make their evening meal Simba meows around their feet. When they go to bed, he plays a hunting game with their feet, *"and the minute you turn the light out he'll hunt you and he'll get your feet and we've got some nice holes and scratches from that ... I think he thinks it's a game to get us before we get onto the bed. It's quite terrifying"*. Simba generally does not sleep on their bed during the night but he has free run of the flat and can sleep on their bed if he chooses. He frequently disturbs their sleep, *"he has a mouse on a stick that squeaks and he'll drag it around the flat at three, four o'clock in the morning"*. They compare this to having a young child.

Lucy sees Simba as a family member and calls him her *"baby"* while Josh refers to the *"genuine friendship"* he shares with Simba. In rationalising her perception of Simba as family, Lucy explains the ways in which Simba's needs are included in household decisions in a way that is similar to how a child would be included in households with children, *"I suppose I just think 'family' because whenever I think of moving now or if we go on holiday or anything like that my first thought is 'what can we do with Simba'"*. Josh also includes Simba in household decisions, *"Any major decision I have always involves Simba ..."*

Anything, anything that I have to make my mind up on it'll always involve some sort of aspect for Simba". Josh includes Simba in household decisions in the same way that Lucy does, but he does not equate this with family membership preferring to think of his relationship with Simba as *"genuine friendship"*. Both Josh and Lucy recognise Simba as a social agent with his own emotions, such as jealousy and talk of Simba being *"in a huff"* with Josh.

Simba influences what happens in the household. Lucy and Josh do not have windows open nor shut internal doors because of Simba. Simba once fell out of an upstairs window when Josh was living with his parents and this event means they are too frightened to have any windows open in the flat in case Simba falls from an open window. Simba does not like any internal doors to be shut so they use a doorstep to keep the bedroom door open.

Simba has a supportive role within the household especially for Josh. As well as providing company for both, *"it's nice to have someone around you"*, Simba has also demonstrated care for Josh when he has been unwell, *"it's nice to have an animal that cares about you"*. Josh suffered severe anxiety attacks during his first year of University and Simba provided valuable support, *"I was having some quite severe anxiety attacks and I would find him coming into my bedroom and he would curl up with me and he'd keep me company"*, *"he just didn't leave my side for the rest of the night"*.

Josh delayed moving into Lucy's flat because of the 'no pet' covenant. He lived with his parents for the first 3 years of Simba's life but was not happy living in that area and was keen to move away. In 2017 Josh moved into Lucy's flat, having seen a cat in a window of the flat below them, *"once I saw that cat downstairs it was like 'we can do this potentially. If they can do it we can definitely do it'"*. Josh would not have moved into the flat with Lucy in 2017 if Simba could not have moved with him. They contacted the letting agents under the pretence of wanting to rent a vacant flat in the building and asked about cats but the agent stated that pets are definitely not allowed. For this reason they decided not to ask for the landlord's consent, *"I was really nervous about asking in case they just figured out that I had a cat"*.

Lucy has an Assured Shorthold Tenancy that bans all pets. Being in breach of the covenant made her anxious in case neighbours heard Simba moving around, *"he does thud quite a bit from being so quick and I worry sometimes that downstairs can hear"*. Lucy decided not to renew the tenancy when the fixed term ended. If it had just been her she would have stayed but they wanted more space for the two of them and Simba, *"for the sake of Simba it was just easier to get a slightly bigger place"*.

Concealing a cat meant they had to think creatively and devise strategies for hiding Simba during the inspections by the managing agent that took place every three months. One time

Josh put Simba in his cat carrier and took him downstairs to a public house where they sat for the afternoon, Josh reading and Simba sleeping. He devised a cunning plan to ascertain if the inspection had taken place. He put a shoe close behind the shut bedroom door and periodically came up to the flat and used his phone to see if the shoe had moved. If it had moved the inspection had taken place and he and Simba were then safe to return to the flat, *"I get a little creative with it just to make sure that I know that they've gone"*. Another time they put Simba in his cat carrier and put it behind the sofa with a pile of textbooks around him and put on the TV with a programme that could disguise Simba's presence if he meowed, *"In case he meowed I put the TV on. We put 'Come Dine With Me' on and I bumped the volume up a bit so if she said 'Did you hear that meow?' I'd go 'Oh, it's a cat on the tv'"*. These strategies in stealth were necessary to conceal Simba's presence because they kept him in the flat in breach of a 'no pet' covenant. However, none of the inspections identified the presence of a cat in the flat so it appears that Simba caused no nuisance nor damage to property.

In looking for a new property to rent they were limited by location and budget but trying to find somewhere that allowed pets was really difficult. Lucy explained *"there were either [properties] that said no pets or other ones that we did contact and then it didn't say outright no pets but when we phoned up they said no pets ... so it did actually really, really limit us and I used to get really panicked thinking we're just going to get kicked out and we'll have to move back home"*. When they eventually found a suitable house they asked for the landlord's consent to keep a cat, *"I made the person I had been speaking to ... email me to say that he was okay for us to have a pet, well to have Simba"*. For Lucy it was important to get the landlord's approval for Simba so they no longer had the stress of concealing a cat and the fear of eviction for breaching a covenant.

5.4.4.1 Additional understanding of Lucy and Josh's experience from a narrative analysis

Their story is one of concealment and stealth, a situation they clearly felt uncomfortable with evident from their moving to a pet-friendly property as soon as the lease ended. They felt *"we had absolutely no option"* but to conceal Simba because the agent told them pets were prohibited in the apartment block without exception.

The key theme to emerge from Lucy and Josh's story is the low availability of pet-friendly property and the consequent effect of needing to conceal their cat from the landlord and letting agent. This falls within my themes of Rental Insecurity and Lack of Choice from my thematic content analysis (see 4.3.1 and 4.3.2). Their experience is similar to that of young pet-owning tenants in Canada who also felt the need to conceal their dogs due to the low availability and poor quality of pet-friendly rental housing (Graham *et al*, 2018). This low

availability caused Lucy to feel “*panic*” and adversely affected her mental health. This compounded the stress and worry she already felt from being discovered and evicted for keeping a cat in breach of the ‘no pet’ covenant. They underwent a number of inspections by the letting agent (every three months) and Simba’s presence in the flat was never discovered. The absence of any damage or nuisance helps to justify their deception in concealing Simba. Similar to Kate, they appear to have adopted a harm assessment approach to justify their deception. Since Simba’s presence in the flat causes no damage to others, there is no harm caused in concealing him.

Unfortunately, I was unable to secure a second interview with Lucy and Josh. I sent Lucy a copy of the story I crafted together with the list of themes but she never replied to my emails. Without the benefit of that second interview, I found it difficult to identify additional themes that had not already arisen from my thematic content analysis. For example, I would like to know the reason for Josh calling Simba a companion rather than a family member. Simba was both a care-giver and care-receiver, supporting Josh when he suffered anxiety as well as combatting loneliness when Josh was at University. Such a supportive role can be a factor in owners constructing their pets as kin (Charles and Davies, 2008) but Josh does not define Simba as a family member. Without the second interview, I was unable to delve deeper to understand his reasons for the label he gave to his relationship with Simba. This shows the value of second interviews when conducting narrative analysis where the purpose is to identify additional themes beyond those emerging from an initial thematic content analysis.

5.4.5 Key themes from the Narrative Analysis

My purpose in using narrative analysis was to discover any additional themes that I had not already identified from my thematic content analysis. Three new themes emerge from the stories I crafted from the interviews with my participants: Symbiotic Relationships; Hierarchy of Family Members and Harm Assessment.

(i) Symbiotic Relationships. The human- companion animal relationship is a social, dynamic relationship that can interconnect the owner with other humans. For example, Darkie was a final link to Bob’s dead wife, Margaret and Annie was part of Julia’s ‘inner circle’ because of the close bond between Annie and Julia’s son and granddaughter. Narrative analysis exposes the human-companion animal relationship in all its complexity and interconnectedness.

(ii) Hierarchy of family members. Kate was the only one of my participants to have a young family consisting of two children and two dogs. She was also the only one to

rehome her dogs due to a 'no pet' covenant in her lease. Her actions could be explained by Shir-Vertesh's concept of "*flexible personhood*" devised to explain how young Israeli couples could initially treat their dogs as their cherished babies then later abandon them when their circumstances changed and the dog became burdensome (2012, p. 428). Are Kate's actions an example of flexible personhood working in the UK? Narrative analysis allowed me to explore Kate's reasons in all their complexity and context, acknowledging the temporality of meanings by following her actions one year after the initial interview. Far from showing flexibility or ambivalence, Kate's reasons for rehoming the dogs and her subsequent actions (in maintaining contact with the new owners) and emotions (her grief, regret and depression) demonstrate the importance of the dogs as family members but as lower ranking members than their two human children. This provides an alternative understanding to the act of an owner relinquishing a companion animal when their life circumstances change.

(iii) Harm Assessment. This proved to be a particularly useful theme to emerge from the narrative analysis. When deciding to move into a house with a 'no pet' covenant in the lease, Kate carried out a harm assessment and used this to justify and rationalise her decision to conceal the existence of the dogs. She already knew that the dogs would not cause any property damage or nuisance so there would be no harm in keeping the dogs in the house. Lucy and Josh took a similar approach when concealing Simba in their flat. The fact that Simba's presence was never discovered by the numerous inspections by the letting agent proved to them that Simba caused no harm to others and justified their actions in keeping him in breach of the 'no pet' covenant.

5.5 Conclusion

The findings from the data analysis of my interviews demonstrate my original contribution to the field. The thematic content analysis of my seven interviews identified a number of key themes and whilst many of these themes are considered in the existing literature they have never been considered together in the context of the co(a)gency of a human+animal+home+lease thereby enabling links between these themes to be identified.

In addressing the question of how people in the UK construct their companion animals as family members, I identified the themes of Agency, Social Support and Ambivalence. In seeking to understand pet-owning tenants' experience of 'no pet' covenants in the UK, I

identified the following five themes: Mental Health; Lack of Choice; Rental Insecurity; Ambivalence; Powerlessness in Negotiations and Perceived Discrimination. Analysing the links between these themes exposed the importance of mental health as a key theme. In contrast to the mental health benefits pets can provide to their owners evident in the Social Support theme, 'no pet' covenants brought about adverse effects on tenants' mental health causing stress, anxiety, grief and feelings of powerlessness and discrimination. This provides valuable understanding of the type of harm 'no pet' covenants can cause to pet-owning tenants and the serious nature of that harm.

My findings identify a link between the sub-theme 'Detrimental Change to Everyday Practices' and the 'Lack of Choice' theme which proved to be particularly relevant in the context of 'no pet' covenants. Pet-owning tenants are accustomed to enduring detriment for the sake of their pet, for example, sleep deprivation, and this sense of sacrifice prepares them for greater sacrifices arising from the low availability and poor quality of pet-friendly housing in the UK.

Ambivalence is a recurrent theme in both Parts of Section 1. Recent changes in societal attitudes to pets both reflect and promote the perception of pets as family members and government policy encourages responsible owners to see pet ownership as a lifetime commitment. However, in open contradiction to this, it is still deemed acceptable for landlords to request an owner to relinquish their pet thereby promoting the idea of pets as disposable property.

The additional themes to emerge in Section 2 from my narrative analysis of four stories are Symbiotic Relationships; Hierarchy of Family Members and Harm Assessment. The Harm Assessment theme proves to be especially useful in critically analysing 'no pet' covenants and the law in England (see Portfolio component 5).

6 PORTFOLIO COMPONENT 5 – Multi-species tenancies in England: a critical analysis of the current state of the law on ‘no pet’ covenants and recommendations for legal reform

6.1 Introduction

In this component of the portfolio, I use the findings from my literature review and interview data analysis to address my research questions 4, 5 and 6:

4. *If tenants perceive their cats and dogs as family members, can the human-companion animal relationship come within private life and family under Article 8, European Convention on Human Rights?*
5. *In what ways, if any, does the existing law in England recognise and protect the human-companion animal relationship in the context of ‘no pet’ covenants in residential leases?*
6. *Is there a need for change in housing law, policy and practice to regulate the use of ‘no pet’ covenants in residential leases in England?*

The black letter law analysis will show that the current law relevant to the existence and enforcement of ‘no pet’ covenants is complicated and confusing for both tenants and landlords. My analysis suggests courts may understate the importance of companion animals to pet-owning tenants thereby attributing insufficient weight to this relationship in possession proceedings. My findings suggest that a ‘Harm Assessment’ approach may be appropriate to address this. Such an approach underlies housing law repossession cases thereby allowing me to harness and manipulate existing tests, with which the courts are already familiar. My data analysis of the interviews helped to identify the character and magnitude of the harm ‘no pet’ covenants can cause to tenants, companion animals and wider society, and this can now be applied to a Harm Assessment. There is a noticeable absence of research on the harm to landlords if the use of ‘no pet’ covenants is restricted and this is identified as an appropriate topic for post-doctoral research.

6.2 Relevant findings from my literature review and data analysis

I start this component by reiterating key findings from my research that will feed into my analysis of the law:

1. Our relationship with companion animals is varied and complex (Blouin, 2013) but many companion animals are perceived as family members and are actively engaged in ‘doing’ family through everyday practices in the home (Irvine and Cilia,

2017; Power, 2017). They are social agents who influence household routines and decisions, sometimes causing detrimental changes that owners are nevertheless willing to accept for the sake of the continuing relationship with their companion animal. This situation is at odds with the legal status of pets as property.

2. Pet ownership has substantial benefits for individuals including contributing to a sense of well-being (fulfilling Weiss's relational provisions), physical and mental health benefits and facilitating a sense of community (Bonas, McNicholas and Collis, 2000; Mubanga *et al*, 2017). Pets can also detrimentally affect owners causing stress and/or disease and can have adverse effects on wider society such as illness caused by animal faeces, disease and bites (Plaut, Zimmerman and Goldstein, 1996). However, there are significant economic benefits to wider society especially savings for the National Health Service worth several billion pounds a year (Hall *et al*, 2016).
3. 'No pet' covenants are extensively used in private sector housing by landlords motivated by risk avoidance who exclude pets in order to prevent the risk of damage to property and/or nuisance to themselves or neighbours. This conceptualisation of 'no pet' covenants as controllers of risk has an adverse effect on human-companion animal relationships. Dogs and cats are perceived by landlords as problems to be avoided. The legal status of pets as property permits landlords to rationalise any request that pet-owning tenants relinquish their pets as mere property loss thereby hiding the true extent of the harm caused to the tenant.
4. 'No pet' covenants are a social problem affecting millions of tenants. The covenants make it difficult for pet-owning tenants to find 'pet-friendly' housing leading to tenant concerns about the low availability and poor quality of such housing (Power, 2017; Graham *et al*, 2018). Some pet-owning tenants resort to stealth techniques to hide their pets from their landlord thereby creating fear of discovery and eviction and perpetuating feelings of rental insecurity (Power, 2017). Such tenants may delay or forgo essential repairs in order to avoid the landlord entering the property (Graham and Rock, 2018) which is detrimental to both the tenant's quality of living and the landlord's financial interests in the property.
5. 'No pet' covenants may force some pet-owning tenants to make significant sacrifices, for example, to move home, sleep on the streets, give up career opportunities or

surrender the close relationship they share with their companion animal. This can have life-changing consequences for the tenant.

6. 'No pet' covenants deny tenants who are not currently pet owners the opportunity to live with companion animals and enjoy the benefits the relationship provides.
7. 'No pet' covenants can directly result in tenants having to relinquish their dog or cat to a rehoming centre which adversely affects the welfare of the animal and generates a cost for rehoming centres and ultimately wider society.

My research demonstrates the character and significance of the harm to tenants, companion animals and wider society that may result from the use of 'no pet' covenants.

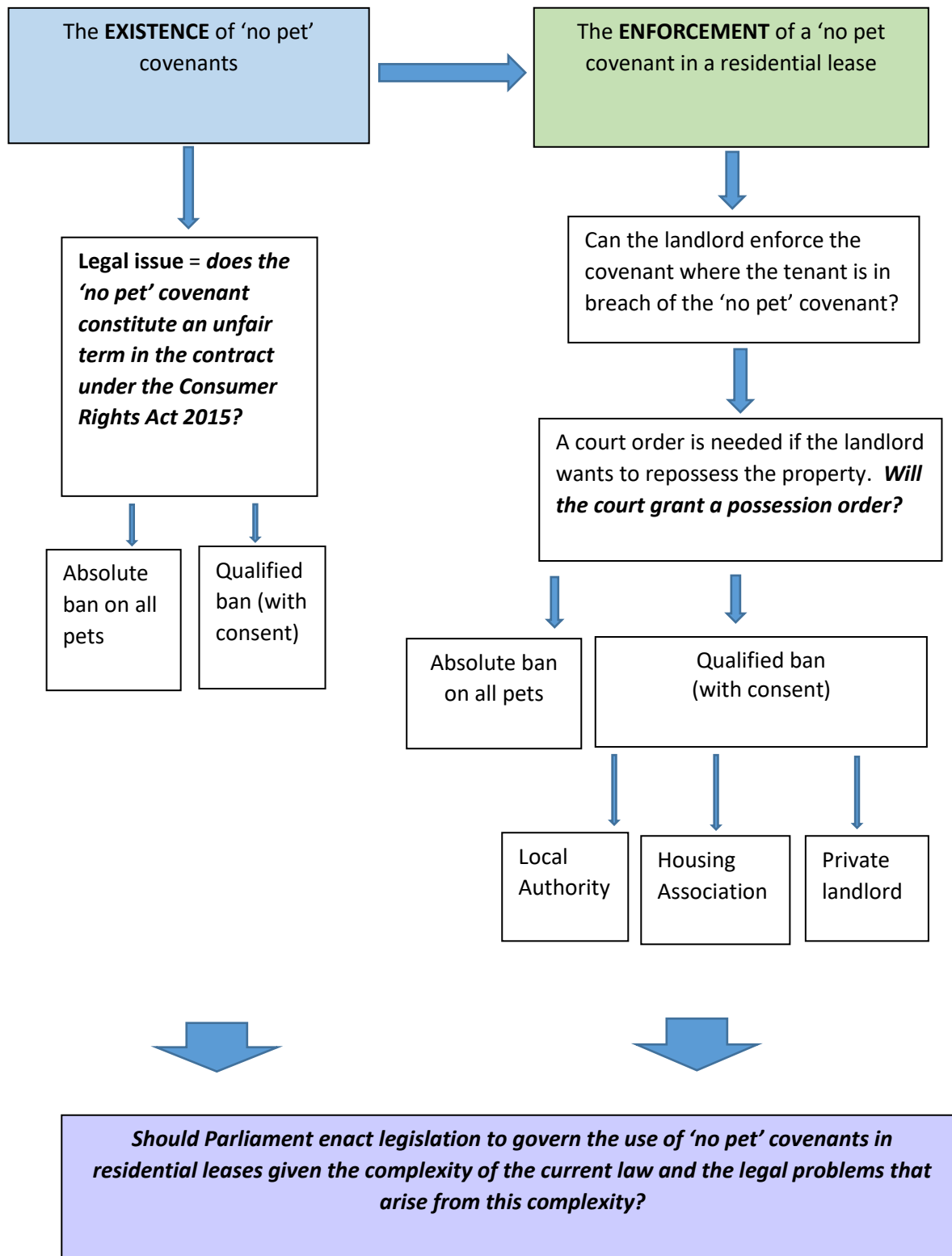
6.3 Two legal questions

I limited my analysis of the law to England only. The use of 'no pet' covenants raises two practical issues at law: the *existence* of the covenant in the tenancy agreement and the *enforcement* of the covenant where a tenant breaches it. This raises two legal questions:

- Is it fair and reasonable to *include* a 'no pet' covenant in a residential lease?
- Can a breach of a 'no pet' covenant be *enforced* in the courts?

There is no specific law that regulates the use of 'no pet' covenants and therefore it is up to the parties to negotiate the inclusion (or exclusion) of a 'no pet' covenant under the principle of freedom of contract. Given the current housing shortages, landlords enjoy far greater bargaining power in the negotiation and in most cases can dictate whether or not the lease will include a 'no pet' covenant. However, the Consumer Rights Act 2015 (CRA 2015) applies to tenancy agreements and prevents landlords including unfair terms in the lease (s.62, CRA 2015). Therefore, the first legal question to address is whether 'no pet' covenants constitute unfair terms under the CRA 2015? The second question is whether a landlord can terminate the lease and repossess the property where a tenant is in breach of a 'no pet' covenant. The process of enforcing this leasehold covenant varies depending on the type of lease and the type of landlord (private landlord or a public authority). The final part of my analysis is to explore ways in which these legal questions can be addressed by Parliament enacting new legislation to regulate the use of 'no pet' covenants. *Figure 14* shows the legal issues arising from the use of 'no pet' covenants.

Figure 14 - The legal issues arising from the use of 'no pet' covenants



6.4 The first legal question: Is it fair and reasonable to include a 'no pet' covenant in a lease?

In assessing fairness the wording of the covenant is crucial. Does the covenant exclude all pets (an absolute prohibition on any pets whatever the species) or is it a qualified covenant that permits only certain pets and with the prior consent of the landlord? Where a lease (whether in the public or private sector) includes a 'no pet' covenant that has an absolute prohibition on all pets, the covenant may be deemed unfair under the Consumer Rights Act 2015 (CRA 2015).

6.4.1 'No pet' covenants as an unfair term under the Consumer Rights Act 2015

The CRA 2015 provides a statutory framework to assess unfair terms in consumer contracts including tenancy agreements. It encourages fairness, reasonableness and transparency and seeks to redress the significant difference in the bargaining strength between landlords and tenants. This is especially important in the current housing climate in which the shortage of housing leaves tenants with little bargaining power to negotiate terms they deem important such as keeping pets. Under the fairness test a term is deemed unfair if,

'contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer' (section 62(4), CRA 2015).

In England, the Office of Fair Trading (OFT) specifically included a reference to 'no pet' covenants in its guidance on unfair terms in tenancy agreements. It objected to a blanket exclusion of pets without consideration of all the circumstances stating that:

'Such a term has been considered unfair under comparable legislation in another EU member state because it could prevent a tenant keeping a goldfish' (OFT, 2005, p. 64).

A similar approach was taken in Germany where an unrestricted ban on pets was held by the Federal Court to be ineffective because it was disproportionate in prohibiting all animals including budgies and fish (BGH 20.3.2013 – VIII ZR 168/12).

In 2015 the OFT was replaced by the Competition and Markets Authority (CMA) in relation to unfair contract terms. The OFT guidance was withdrawn and replaced with the CMA Unfair Contract Terms Guidance, 2015. Unfortunately, the CMA guidance does not specifically refer to the unfairness of an absolute prohibition of all pets. However, the CMA guidance makes it clear that the CRA 2015,

"carries forward rather than changing protections provided to consumers under earlier legislation ... The fairness and transparency provisions are effectively the same" (CMA, 2015, pp. 14-15).

Therefore, it appears that the OFT guidance on the unfairness of an absolute prohibition on all pets carries forward under the CRA 2015. However, the absence of any express mention of ‘no pet’ covenants in the CMA guidance creates uncertainty as to the current approach and there have been recent calls for clarification on this point of law (Battersea, 2018; Cats Protection, 2019).

Many other countries also adopt the principle of good faith in consumer contracts including Anglo-Commonwealth countries (Tarr, 2015). The Indian case of *Shri Ajay Madhusudan Marathe v New Sarvodaya Co-operative Housing Society Ltd* (No.160/2008, State Consumer Disputes Redressal Commission, Mumbai) offers an example of a policy that excluded pets from part of a residential building being challenged under consumer rights law. The dispute Commission held that the landlord acted unfairly when it passed a resolution preventing tenants from taking their pet dogs into the building’s lifts (Valpey, 2018).

Research suggests that few social housing landlords impose a blanket ban on pets (Battersea, 2018), but it appears to be more common with private landlords. A number of my participants (Kate, Emma, Julia, Isabel and Lucy and Josh) experienced absolute ‘no pet’ covenants that excluded all companion animals. In the private sector, landlords in England can ensure fairness and transparency (complying with CRA 2015) by adopting the Department of Communities and Local Government, Model Agreement for an Assured Shorthold tenancy (2016) which states,

“The Tenant must not keep any pets or other animals at the Property without the prior written consent of the Landlord which must not be unreasonably withheld or delayed. If permission is given, it may be given on the condition that the Tenant pays an additional reasonable amount towards the deposit”.

The reference to paying a reasonable amount towards a pet deposit is now out of date. The Tenant Fees Act 2019 capped deposits to five weeks rent in most leases, which means landlords cannot ask for an additional deposit to specifically cover potential damage to property caused by the pet.

The accompanying guidance to the Model Agreement states,

“the landlord cannot exercise a blanket ban on pets and should not turn a request down without good reason” (DCLG guidance, 2016, p. 24).

In January 2020, the Government announced its intention to revise the Model Agreement

“to remove restrictions on well behaved pets – to ensure more landlords are catering for responsible pet owners” (MHCLG, 2020a).

Although the Model Agreement ensures fairness and transparency, landlords are not required to adopt it and therefore the proposed changes may have limited impact in practice.

While a blanket ban on all pets appears to contravene the CRA 2015, a qualified covenant that allows pets with the prior consent of the landlord is clearly lawful. It is likely that a landlord's concern that cats and dogs may cause property damage and nuisance will be sufficient to constitute a reasonable refusal to allow a tenant to live with a cat or dog.

6.4.2 The exclusion of dogs

A covenant that specifically excludes dogs is likely to be deemed fair under the current law. The limited case law on the subject suggests that it is reasonable to prohibit the keeping of dogs especially in flats where there are communal areas. In *Sheffield City Council v Jepson* (1993) 25 H.L.R 299 the trial judge referred to the reasonableness of including a 'no dog' covenant for a lease in a block of flats with shared common parts and a common means of access,

"The condition itself was eminently reasonable. Prohibition of keeping dogs about the place was the only way in which people in close proximity could possibly exist" (at p. 302).

The Court of Appeal concurred with this view,

"The condition itself was necessary, as the judge found, for the well-being of the tenants of the block" (at p. 303).

The judicial review case of *Victory Place Management v Kuehn* [2018] EWHC 132(Ch) provides more recent insight into the reasonableness of including a 'no dog' covenant. The property in question was part of a gated residential development of 146 luxury flats held on long leases. The tenant management company, run by the tenants themselves, operated a strict 'no pet' policy and the lease included a covenant that no pets were permitted without their consent. Mr and Mrs Kuehn moved into a flat with their dog, Vinnie. The landlord gave consent for the couple to keep their dog in the flat but the tenant management company refused consent and sought an injunction to have Vinnie removed from the property. The Kuehn's challenged the decision-making process by which the tenant management company reached its decision to refuse consent. The court held that it had acted reasonably in reaching its decision; the 'no pet' policy was not an inflexible rule predetermining the outcome of all applications because the management company was willing to give consent for a dog in special circumstances (Colby, 2018; Symons, 2018). The court's decision is not surprising on its facts but what is interesting for my research is the tenant management company's reason for its 'no dog' policy which was endorsed by the court as reasonable,

“Its members did not want dogs on the estate, based on reasonable concerns about them barking, chewing or defecating in public areas” (at para. 21).

Such rhetoric reinforces a culture of fear grounded in problematic assumptions about dogs as unruly and contaminating (Serpell, 1995). The fact that the court found these concerns of barking, chewing and defecating in public spaces to be ‘reasonable’, even though there was no evidence of Vinnie herself causing any nuisance, typifies objections raised about dogs and reflects a broader cultural conception of dogs as disruptive, unhygienic and polluting (Fox and Ray, 2019). This conception of dogs fails to acknowledge the benefit they provide as Social Capital (Charles and Davies, 2008) facilitating a sense of community in wider society (Wood *et al*, 2017).

While case law suggests that it is fair and reasonable to exclude dogs from communal residential property the position for a house, especially if it has a private garden, is less clear (Battersea, 2018). The fairness of a covenant that prohibits cats, especially in relation to house cats that never leave the property, is also unclear (Cats Protection, 2019).

Therefore, the question of whether it is fair to include a ‘no pet’ covenant in a tenancy agreement depends on the wording used; if the lease stipulates a blanket ban on all pets the clause is likely to be deemed unfair and consequently void. An unfair covenant will be struck out of the lease (with the rest of the tenancy remaining intact). This leaves the landlord vulnerable to the risk of a tenant keeping pets on the property and there being no covenants in the lease to deal with pet related problems. However, it is not certain that the CMA will adopt the same approach as the OFT guidance. This means that the current position at law is uncertain and there is an urgent need for clarification.

6.5 The second legal question: can a breach of a ‘no pet’ covenant be enforced in the courts?

The enforcement of leasehold covenants in England is a complex area of law because various tests and procedures exist dependent upon the type of landlord (public sector or private sector) and type of lease.

6.5.1 Public sector housing: Secure tenancy (council tenant) and Assured tenancy (Housing Association tenant)

If a secure or assured tenant is in breach of covenant, the landlord can only repossess by obtaining a court order for possession. Schedule 2, Housing Act 1985 (HA 1985) sets out the grounds for repossessing a secure tenancy and ground 1 applies where a tenant is in breach of the terms of the tenancy agreement, for example, by keeping a dog or cat on the premises in breach of a ‘no pet’ covenant. However, s. 84, HA 1985 applies a reasonableness test, first introduced in 1980 (Carr and Cowan, 2015), meaning that the court can only grant a

possession order if it thinks it reasonable to do so. This raises an important question for my research: 'Where the tenant is in breach of a 'no pet' covenant is the mere presence of the pet enough to make it reasonable to grant a possession order or will the court only permit repossession if the pet is causing damage or a nuisance or danger to others?'

6.5.1.1 *The reasonableness test in repossession cases: identifying relevant circumstances*

The reasonableness test presents an additional obstacle for a local authority landlord in repossession cases. The court must address reasonableness even where the ground for possession has been satisfied and it is for the landlord to satisfy the court that it is reasonable to make a possession order (Luba, 2016). Reasonableness is a question of fact for the county court judge and an appeal court can only review the trial judge's decision on the basis of an error of principle or if the decision is plainly wrong. The judge must take into account all the relevant circumstances at the date of the hearing and allocate weight according to what he/she considers right,

"the duty of the judge is to take into account all relevant circumstances as they exist at the date of the hearing ... in a broad, common sense way ... giving weight as he thinks right to the various factors in the situation" (Lord Greene M.R. in *Cumming v Danson* [1942] 2 All E.R. 653 at 655).

Significantly, for my purposes, the judge must consider the effect on the landlord and tenant, firstly, if a possession order is granted and secondly, if a possession order is refused.

In *Cresswell v Hodgson* [1951] 1 All ER 710 Somervell L.J. said,

"the county court judge must look at the effect of the order on each party to it. I do not see how it is possible to consider whether it is reasonable to make an order unless you consider its effect on landlord and tenant, firstly, if you make it, and secondly, if you do not" (at para. 96).

When the Court of Appeal in *Whitehouse v Lee* [2010] H.L.R 11 took into account the effect of not making an order it realised that the landlord suffered no harm and consequently the possession order was set aside. I find this approach of assessing the harm to the respective parties of granting and refusing a possession order a valuable tool for further consideration in relation to the use of 'no pet' covenants and will return to it later (at 6.5.1.3).

In ascertaining all the relevant circumstances there are a number of factors specifically relevant to 'no pet' covenants:

- the human-companion animal relationship may come within private life and family in Article 8, European Convention on Human Rights (ECHR);

- companion animals provide socially supportive relationships;
- pet ownership has implications for society including economic benefits.

Each factor is considered below:

(i) the human-companion animal relationship may come within private life and family in Article 8, ECHR

I argue that the human-companion animal relationship falls within the Art.8 rights of private life and family (at 6.5.2.1). If this is correct then the trial court should take the relationship into account under the reasonableness test because case law has made it clear that the court considers the same factors in the reasonableness test as it would in the human rights defence under Art.8. In *Manchester County Council v. Pinnock* [2011] 2 AC 104 the Supreme Court stated,

“Any factor which has to be taken into account ... for the purpose of assessing proportionality under Article 8(2), would have to be taken into account... for the purpose of assessing reasonableness under section 84 of the 1985 Act...” (at para.55).

Any case that fails under Art.8 as disproportionate will also fail under the reasonableness test:

“It therefore seems highly unlikely, as a practical matter, that it could be reasonable for a court to make an order for possession in circumstances in which it would be disproportionate to do so under Article 8” (Pinnock at para.56).

Taking into account the familial character of the human-companion animal relationship and its significance to pet owners, and the fact that a particular animal causes no property damage or nuisance to others, the court may deem the enforcement of a ‘no pet’ covenant as causing disproportionate harm to the tenant.

(ii) companion animals provide socially supportive relationships

In *Whitehouse v Lee*, the private landlord sought to relocate the tenant (under the Rent Act 1977) to suitable alternative accommodation. The tenants had lived in the flat for over 45 years and were actively engaged in the close-knit local community. In applying the reasonableness test (an equivalent test exists in the Rent Acts) the court considered the

“material loss to the tenants of their all-important, regular, informal contact with friends and neighbours” ([2010] H.L.R. 11 at para.38).

The Court of Appeal said this ‘social and emotional’ support from friends and neighbours had not been given the acknowledgment it deserved by the judge in his decision to grant a

possession order. This approach has implications for the enforcement of 'no pet' covenants because there is a large body of research evidencing the socially supportive role that companion animals play in the lives of the humans they live with (see section 1.4.2 of the commentary). *Whitehouse v Lee* demonstrates how social support can be a significant factor in the reasonableness test and may tip the balance in favour of refusing the landlord a possession order. This suggests that the social and emotional support from a companion animal is a relevant factor in the reasonableness test.

(iii) pet ownership has implications for society including economic benefits

Cresswell v Hodgson provides authority for the public interest being taken into account as a relevant factor in the reasonableness test. There is a cost to society when a tenant is required to relinquish ownership of a companion animal both in terms of the extra costs on pet rehoming centres but also on the greater burden on the National Health Service that can arise when tenants, especially vulnerable people such as the elderly or isolated, are required to rehome their companion animals (Siegal, 1990; Hall *et al*, 2016).

My analysis of the law indicates that these three factors constitute relevant circumstances in the court's assessment of the reasonableness test in cases where tenants are in breach of a 'no pet' covenant. The next section examines the actual approach taken in the small number of reported cases involving a breach of a 'no pet' covenant.

6.5.1.2 The approach of the court to a breach of a 'no pet' covenant: existing case law

There are three Court of Appeal cases specifically concerning a tenant's breach of a 'no dog' covenant (Pawlowski, 1997; Aldridge, 2019, Woodfall, 2019a). These cases provide valuable insight into the court's approach to the reasonableness of granting a possession order for the breach of a 'no pet' covenant.

In *Bell London and Provincial Properties Ltd v Reuben* [1947] KB 157 the Court of Appeal held that the trial judge was justified in refusing to grant a possession order where the tenant was in breach of a 'no dog' covenant even though she intended to keep the dog and thereby continue to breach the covenant. Morton LJ said,

"It is only in a very special case indeed that the court could properly refuse to give the landlord possession if a tenant broke that covenant and insisted on breaking it" (at p. 163).

The facts in *Reuben* constituted a special case because substantial weight was given to the medical evidence of the tenant's doctor that the dog was necessary for her mental health and well-being. She first acquired a dog on the doctor's advice because she suffered from her nerves following a burglary at home. She relinquished that dog when the landlord

threatened eviction and her condition deteriorated so she acquired a second dog. The Court of Appeal observed that the tenant's need for the dog (and hence the reasonableness of refusing possession) would only last as long as her medical condition. The landlord could seek a repossession order in the future if the tenant's mental health improved. Morton LJ said

"I think the learned judge may well have thought that the lady, having shown reasonable spirit, would part with the dog if and when it became no longer necessary" (at p. 165).

This decision is not a recognition of the close human-dog relationship as at first appears. Instead, it is about the use of the dog as a guard dog to help the tenant feel secure in her flat. Once that use is no longer needed, the dog must be given up for rehoming. Therefore, *Reuben* is authority for the principle that the purpose of the dog within the household is a relevant consideration in the reasonableness test. In the 1940s when *Reuben* was decided, dogs were unlikely to be seen as family members (Franklin, 2006) so it is unsurprising that the court relied on the purpose of the dog as a guard dog providing security for the tenant. Nowadays, as evidenced by the data collected in this study, dogs are perceived as valuable members of the family providing social support, companionship and contributing to the well-being of their owners and it is therefore arguable that this new socially supportive role of dogs can be taken into account in addressing the question of reasonableness.

It is clear that the court will take the human-companion animal relationship into account where there is supporting medical evidence that the tenant's health will be adversely affected by having to rehome their pet (I will refer to this as the medical evidence rule). In a first instance case, *City of London Corp v Prior* (unreported, 1996) the landlord sought repossession where the tenant kept a dog in breach of her tenancy agreement. The trial judge refused possession relying on expert psychiatric evidence that,

"any enforced separation could result in tragic consequences" (Judge Byrt Q.C., quoted in Anonymous, 1997).

Given the extensive literature on the physical and mental health benefits of pet ownership, it is arguable that courts should now take advantage of this evidence in all cases involving a breach of a 'no pet' covenant.

The remaining two Court of Appeal cases both involved a local authority landlord, Sheffield County Council, enforcing a 'no pet' covenant and in both cases the court decided in favour of the council. The case of *Green v Sheffield County Council* (1994) 26 HLR 349 followed *Reuben* but, unlike *Reuben*, there was nothing on the facts to show a 'special case' scenario to justify refusing possession. The dog had been acquired many years earlier on the recommendation of a senior police officer to reassure the tenant's wife due to her fear of

being attacked in the wake of the activities of the Yorkshire Ripper. At the date of the hearing the Yorkshire Ripper was no longer a threat and the tenant and his wife were divorced. In the eyes of the court, the purpose for keeping the dog no longer existed and the Court of Appeal stated,

“there was no evidence before the judge that was capable of supporting the exercise of discretion in the defendant’s favour”(at p. 350).

At the first instance trial, no evidence was adduced of the relationship between the tenant and his old dog nor as to the welfare of the dog in continuing to live with the tenant. However, the Court of Appeal judgement indicates that had the tenant submitted this evidence at the initial possession hearing it could have been relevant to the question of reasonableness. Dillon LJ said that the tenant submitted evidence to the appeal court that the dog was his “*old friend*” and he could not face having the dog euthanized (as it would be difficult to rehome the dog due to his very old age). A substantial bundle of letters in support of the tenant and signed by other tenants was given in evidence to the appeal court. The appeal court’s response is significant:

“If the judge had had all these testimonials supplied and the witnesses had turned up as necessary to explain that the dog was indeed harmless and a friend, then it might have had some effect on the judge, but it was not the evidence that was put before him” (at p. 353).

This extends the medical evidence rule and suggests that any pet-owning tenant, not just those with serious medical conditions, can submit evidence of a close relationship with a companion animal as a friend or family member and such evidence can be considered by the court as a relevant circumstance in the reasonableness test.

In *Sheffield County Council v Jepson* (1993) 25 HLR 299 the trial judge dismissed evidence from the caretaker of the block of flats, that the tenant’s dog was a nuisance by urinating in common parts, as hearsay and felt that it was unreasonable to evict the tenant (and her four month old baby) without admissible evidence of nuisance by her dog. The Court of Appeal said this was the wrong approach and that,

“There is no principle that the council can only prove such a breach of such a condition as will justify the making of an order if it provides also that the forbidden dog has been shown itself to have been the direct cause of specific consequences constituting nuisance” (at p.303).

This is an unfortunate decision as it suggests that if there is evidence of dogs on the council estate causing nuisance to other tenants then the judge may grant a possession order even if the tenant’s own dog is well-behaved and has caused no harm to others. If this is the correct approach then it appears to support a disproportionate response from the landlord

and fails to give sufficient weight to the harm a tenant may suffer if required to relinquish a companion animal deemed to be a family member.

6.5.1.3 *The reasonableness test and an assessment of harm*

The reasonableness test may, in appropriate cases, incorporate an assessment of harm to the parties. In a number of 'no fault' cases where a landlord sought a possession order to force a tenant to move to suitable alternative property, the court carried out a Harm Assessment as a vital component of the reasonableness test (*Cresswell v Hodgson* [1951] 1 All E.R. 710; *Whitehouse v Lee* [2010] H.L.R 11). A key factor in *Whitehouse v Lee* was the absence of harm to the landlord if the possession order was refused compared to the substantial hardship to the tenant if the order was granted. On this basis, the Court of Appeal reversed the trial judge's decision and set aside the possession order. This approach was applied more recently in a first instance case involving a companion dog. In *Governors of the Peabody Trust v Lawrence* (2015) LAG 43 the tenant succeeded to her mother's secure tenancy of a three bedroomed property which was located on the ground floor with access to a garden. The Housing Association landlord sought possession of the property arguing that it was too large for the tenant and offered her alternative housing. The tenant opposed this on the grounds that the alternative housing only had one bedroom (which prevented her overnight carers staying with her) and there was no access to an outside space for her dog. The tenant had significant mental health issues and argued that the dog was an important source of support. The trial judge recognised the demand for family sized social housing in London but felt that in all the circumstances the risk of harm to the tenant if an order were granted outweighed the social benefit of making the three-bedroomed property available to others. On the basis of this harm assessment, the judge held that it was not reasonable to make a possession order on the facts.

Significantly for my research the court has also applied a Harm Assessment approach to a continuing breach of a 'no pet' covenant. In *Bell London and Provincial Properties Ltd v Reuben* [1947] KB 157 the landlord argued that where a tenant deliberately breaches a covenant and intends to continue to breach the covenant it would never be reasonable to refuse a possession order. The Court of Appeal disagreed, observing that

"If there was evidence in a case that a breach was doing no harm of any kind to the landlord or his interests, and if there was also evidence that the breach and its continuance was avoiding substantial hardship to the tenant, I am not prepared to say that in those circumstances there would be no discretion" (Somervell LJ at p.165).

If we apply this same reasoning to a local authority tenant keeping a dog or cat in breach of a 'no pet' covenant where the animal causes no damage nor nuisance to others then it

would appear that the court could exercise its discretion and refuse to grant a possession order on the basis that the landlord suffers no harm if the order is refused whereas the tenant suffers significant hardship if it is granted.

6.5.1.4 Summary of the reasonableness test as applied to 'no pet' covenants

Case law on the reasonableness test shows that only in special cases can the court refuse possession where a tenant is deliberately in breach of the covenant and intends to continue the breach. Where a tenant is in breach of a 'no pet' covenant the socially supportive role of a companion animal can constitute a special case where the tenant has health problems and expert medical evidence is submitted to show the importance of the pet to the tenant's health. The reasonableness test includes a harm assessment to assist judges in balancing the interests of the respective parties. Given the wealth of research demonstrating the health benefits of companion animals and the socially supportive roles they play for many people, not just those with severe mental health problems, I suggest that it is appropriate for the courts to recognise and protect the human-companion relationship through a Harm Assessment within the reasonableness test for all pet-owners facing eviction for breach of a 'no pet' covenant. This would mean that in those cases where the specific companion animal causes no harm to property nor person, the landlord could be refused a possession order.

6.5.2 Public sector housing: Introductory tenancy

The reasonableness test does not apply to introductory tenancies (s.127(2), Housing Act 1996). Introductory tenancies are used for new council tenants and effectively provide a 12-month probationary period during which the tenant has no security of tenure. The aim of the introductory tenancy scheme (created by the Housing Act 1996) is to

“test the tenant's behaviour over a one year period in order to see whether he can be a responsible tenant” (Southend-on-Sea v Armour [2014] HLR 23 at 26).

If a tenant under an introductory tenancy breaches a 'no pet' covenant and the local authority landlord seeks possession, could the human-companion animal relationship be protected under human rights using the Article 8 defence? This defence enables a tenant who is threatened with eviction to challenge the grant of a possession order on the basis that it will contravene his/her convention rights under Art.8 ECHR (Luba, 2016). This section will therefore consider two questions: first, does a tenant's relationship with their companion animal come within private life and family under Art.8?; and second, should the court consider the human-companion animal relationship within the Art.8 defence in possession proceedings?

6.5.2.1 *Does the human-companion animal relationship come within private life and family under Article 8 ECHR?*

I advocate that the human-companion animal relationship falls within private life and family under Art.8 ECHR as incorporated into domestic law under the Human Rights Act 1998 (HRA 1998) (Rook, 2018, Portfolio component 1, 2.1). Under Art.8

Everyone has the right to respect for his private and family life, his home and his correspondence.

The purpose of Art.8 is to

protect the individual against intrusion by agents of the state, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose (R (Countryside Alliance) v A.G [2007] 3 WLR 922, p. 10).

The strength of the argument that the human-companion animal relationship comes within Art.8 lies in the character of the relationship. My research findings show that many people socially construct their pets as members of their family through everyday practices in the home and enjoy a socially supportive relationship with their companion animal that is similar to socially supportive human-human relationships (see section 1.6 of the commentary). In recent years, the concept of family has moved away from formal blood, adoption and marriage ties to recognise the Cultural Construction of Kinship (Charles and Davies, 2008) and embrace the idea of '*families we choose*' (Weston, 1991). There is recognition of this shift at law, for example, the Human Fertilisation and Embryology Act 2008 recognises a lesbian co-parent as a 'female parent' akin to a father (Fox and Ray, 2019) and in 2001 the House of Lords held that a gay couple could be a family within the context of the Rent Act 1977 by utilising the functional family approach (Fitzpatrick v Sterling Housing Association [2001] 1 AC 27). Millbank (2008) shows how the functional family approach achieved legal rights for same-sex families in Canada, Australia, the USA and the UK. This acceptance at law of the Cultural Construction of Kinship within the sociological concept of a 'functional family' could extend beyond the humanist approach to family and recognise the possibility of kinship between people and companion animals. Recently there has been some recognition of the importance of the human-companion animal relationship in legal circles.

In Parliamentary debates on The Pets (Theft) Bill 2018, which proposes that pet theft become a criminal offence in its own right with appropriate sentencing to reflect the seriousness of the harm caused, it was stated

"We are talking about the abduction of an animal – of what most pet owners would consider a central part of their family" (Hansard, 3 July 2018).

In 2016, the English court of protection held that the quality of life of an elderly woman, Mrs P, living in a nursing home, was adversely affected by the appointed deputy's decision to refuse her access to her dog, Bobby (*P v Rochdale BC* [2016] 7 WLUK 412). The judge approved an order to appoint a new deputy to manage her finances; one of the reasons being the initial deputy's failure to appreciate the importance of her dog to her well-being,

'...assessments made clear that the only living being with whom she shares any love or devotion is her dog, Bobby' (at para.14).

That the judge was prepared to give significant weight to this and recognise Bobby's role in promoting Mrs P's well-being, demonstrates the law's attempt at recognising human-animal relationality (Fox and Ray, 2019) and is a small but symbolic step. This case led to a suggestion that the concept of family under Art.8 might include a hybrid animal/human family (Fox and Westwood, 2017). Fox and Ray (2019) developed this idea further using a function-based approach to family that incorporates companion animals as family members based on the reciprocal care-giving and companionship that characterises this interspecies relationship.

Whilst recognising the difficulties in reaching a consensus on a definition of the family, Herring found certainty in one thing,

"What is clear is that the definition of a family may change over time" (Herring, 2019, p. 5).

The case of *Gammans v Ekins* [1950] 2 KB 328 illustrates how the legal definition of family has changed in England since the 1950s. In that case, the court stated that to say a co-habiting heterosexual couple were a family was

"an abuse of the English language" (at p. 331).

Nowadays the leading case on the meaning of family in law is the House of Lords decision in *Fitzpatrick v Sterling Housing Association* [2000] 1 AC 27. In this case the court held that a co-habiting gay couple were a family for the purposes of the Rent Act 1977 thereby enabling the surviving partner to succeed to the tenancy of the deceased. The court accepted that family is not limited to people linked by blood or marriage. Lord Slynn submitted that the characteristics of family life were

"that there should be a degree of mutual inter-dependence, of the sharing of lives, of caring and love, or commitment and support" (at p. 32).

The definition of family in English law had clearly changed in the 50 years since *Gammon v Ekins* with the court adopting a functional family approach in cases where there is not a clear familial relationship marked by blood, marriage or adoption.

That the definition of 'family' under Art.8 will develop with changing social norms is not a new idea and was observed by Feldman in the 1990s,

"The right to respect for family life has protected a growing variety of relationships as changing social norms have broadened the range of arrangements regarded as falling within the term 'family'" (Feldman, 1997, p. 267).

It seems appropriate that as it becomes commonplace and acceptable for people to view companion animals as part of their family, the jurisprudence of human rights law should develop to expand the definition of family to include companion animals.

If the courts are unwilling to define companion animals as family members, the broader concept of 'private life' under Art.8 may be invoked. The fact that the concept of 'private life' is incapable of exhaustive definition means that the case law has been allowed to develop to keep up with developments in society, for example, more enlightened views about homosexuality in the British armed forces (*Smith and Grady v UK (2000) 29 EHRR 493*).

The interpretation of 'private life' under Art.8 has resulted in three broad categories of cases:

"(i) a person's physical, psychological and moral integrity, (ii) his privacy and (iii) his identity" (European Court of Human Rights, 2018, p. 20).

Identity is itself a wide category and includes the right to personal development, and the right to establish and develop relationships with other human beings and the outside world (*Niemietz v Germany (1992) 16 EHRR 97; Pretty v UK (2002) 35 EHRR 1*). Private life encompasses matters of autonomy and self-determination including freedom to choose one's personal relationships. Given that the nature of the close social bond people develop with their companion animals is akin to the close human-human relationships that are so clearly protected under Art.8, it is arguable that the right of a person to maintain and develop their relationship with their companion animal falls within Art.8 (Rook, 2018, Portfolio component 1, 2.1). Since 'private life' encompasses

"a zone of interaction of a person with others" (Peck v UK (2003) 36 EHRR 41 at p. 57)

it is reasonable to suggest that 'others' is not restricted to humans but can include any living, sentient being that fulfils some of Weiss' relational provisions necessary for human well-being. Therefore, where a relationship already exists between a person and their companion

animal, Art.8 may be engaged if the state (in the form of a public authority landlord) interferes with that relationship by requiring the tenant to surrender his/her companion animal for rehoming.

There is authority from Europe that contradicts my argument that the human-companion animal relationship falls within Art.8 (*X v Iceland (1976) Application no.6825/74*) but this decision of the Commission is outdated and out of line with recent research. In the 1970s, an Icelandic national challenged regulations in Reykjavik that prohibited the keeping of dogs in the city. In its brief decision, the Commission stated that the right to keep a dog did not fall within the scope of Art.8 and upheld the regulations. However, our relationship with dogs has changed significantly over the last 50 years (Franklin, 2006). For most dog owners, their dog no longer lives in an outside kennel but instead shares the most private and intimate spaces in their homes, even sleeping in the owner's bedroom or on their bed (Power, 2008). In the 1970s, there was a distinct lack of research on the nature of the human relationship with companion dogs and the Commission cited no research in its decision. As discussed previously, there is now a significant body of research dedicated to understanding the physical, psychological, physiological, therapeutic and social health benefits of this relationship (at section 1.4.2 of the commentary). The courts and Strasbourg institutions recognise that the Convention is a living instrument and that its jurisdiction

“develops in accordance with the demands of changing social conditions” (Qazi v Harrow LBC [2001] EWCA Civ 1834 at para 47).

The fact that in the 1970s the Commission did not think that keeping a dog came within Art.8 does not prevent a different view being adopted almost 50 years later. Similarly, cases concerning gender identity have undergone a recent change in approach. In the 1980s and 1990s cases in which transsexuals complained that UK law did not have a system for conferring an accurate legal status on them were unsuccessful (*Rees v UK (1987) 9 EHRR 56; Cossey v UK (1991) 13 EHRR 622; Sheffield and Horsham v UK (1998) Reports of Judgments and Decisions 1998-V, p. 2021*) but by 2002 the court found a violation of Art.8 owing to a clear and continuing international trend towards increased social acceptance of transsexuals. Taking into account these societal developments, the court reached the conclusion

“that the notion of fair balance inherent in the Convention now tilts decisively in favour of the applicant” (Goodwin v UK (2002) 35 EHRR 447 at para 93).

This demonstrates how the concept of private life is flexible enough to keep pace with societal developments which means that as our relationship with companion animals changes and develops, so too must the Art.8 case law. That the Belgium domestic courts have adopted this view is evident from a case in 1986 concerning a Persian cat. The court of

first instance in Liege held that the total ban on keeping any pets at the property without reference to any harm or nuisance caused by the pet

“does indeed undermine, in the current state of social conceptions and habits, the right of the integrity of the private life, of the family and home life” (Civ. Liege 21 October 1986, J.L.M.B., 1987)

enshrined in Art.8. The court took into account societal changes in how people perceive their companion animals and interpreted the law to keep pace with these changes. It recognised how the integrity of a person's private life is affected by having to relinquish a cherished companion animal.

6.5.2.2 Should the court consider the human-companion animal relationship within the Article 8 defence in possession proceedings?

Establishing that the human-companion animal relationship comes within Art.8 does not guarantee its protection in all circumstances. Art.8 rights are discretionary rights which means that state interference may be justified under Art.8(2) where it is *“in accordance with the law”* and provided that the interference is *“necessary in a democratic society”* in the interests of

“public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

A local authority landlord can therefore interfere with a tenant's right to private life and family if the interference falls within one of these exceptions, for example, protecting the health of other tenants. However, any interference must be proportionate to the legitimate aim to be achieved and excessive means are not permitted (Rook, 2001, Portfolio component 1, 2.3 *contains extracts from my book that examine the concept of proportionality in depth*).

Introductory tenancies are subject to mandatory possession procedures meaning the reasonableness test does not apply and the court has no discretion. Under s.127(2), HA 1996 the court must make an order for possession unless it finds that specified procedural requirements have not been met. The decisions of the Supreme Court in *Manchester City Council v Pinnock* [2011] 2 AC 104 and *Hounslow London Borough Council v Powell* [2011] 2 AC 186 established that Art.8 is engaged in mandatory possession proceedings and the court can consider whether repossession is a proportionate response under Art.8 (Woodfall, 2019b). Therefore, where an introductory tenant has breached a 'no pet' covenant in the lease and the local authority landlord seeks to repossess the property the tenant can raise an Art.8 defence. The court should consider Art.8 summarily and only if it is satisfied that the defence is *“seriously arguable”* (Powell at para. 33) and could affect the order made will it adjourn the case to review proportionality further. Therefore, it is *“only in very exceptional*

cases” (*Pinnock* at para. 36) that the court will go beyond a summary assessment of proportionality and this is likely to succeed in only a very small proportion of cases (Madge, 2011). In *Pinnock* the Supreme Court stated,

“Therefore, in virtually every case where a residential occupier has no contractual or statutory protection, and the local authority is entitled to possession as a matter of domestic law, there will be a very strong case for saying that making an order for possession would be proportionate. However, in some cases there may be factors which would tell the other way” (at para. 54).

In a small number of cases the personal circumstances of the tenant may deem the grant of possession disproportionate. *Southend-on-Sea v Armour* [2014] HLR 23 is the only reported case where the Art.8 defence has been successful to date (Ramshaw, 2014). It concerned an introductory tenant whose anti-social behaviour at the start of his tenancy had significantly improved between the time of issue of the proceedings and the date of the hearing, one year later, that the trial court felt it would be disproportionate to evict him. A significant factor in the court’s decision was the aim of the introductory tenancy scheme, which is to provide a one-year probationary period to assess the behaviour of a new tenant. Since his behaviour for the preceding year had been acceptable, the Art.8 defence succeeded. However, in most cases an Art.8 defence will fail unless there are exceptional circumstances. Considerable weight is given to the local authority’s ownership rights and its public duty as a social landlord to allocate and manage its housing stock for the benefit of the whole community. This may be outweighed by personal circumstances in the case of vulnerable tenants such as those with a mental illness (Cowan and Hunter, 2012). In general, the local authority landlord has a low threshold to cross to justify terminating an introductory tenancy bearing in mind the purpose of the introductory tenancy scheme and the procedural safeguards to protect the tenant. Therefore, it may seem futile to argue that the human-companion animal relationship falls within Art.8 as it is unlikely to have much practical effect in possession proceedings against pet-owning introductory tenants. Nevertheless, it is worthwhile establishing this because the argument can have a wider application.

6.5.2.3 The wider application of bringing companion animals within Art.8 ECHR

Human rights arguments could be usefully applied in the following situations:

(i) Housing vulnerable people

Human rights arguments can be relevant to housing vulnerable people where the local authority plays a role, for example, elderly pet owners moving into a local authority owned care home (Fox and Ray, 2019) or homeless people who own pets and want to be accommodated with their companion animal (Carr, 2016). In these instances, it can be

helpful for pet owners to establish that the close relationship they share with their companion animal falls within private life and family under Art.8 and therefore is protected from unjustified state interference. In recognising companion animals as vulnerable subjects with a potential claim to legal recognition as family members, Fox and Ray observe,

“This opens up the possibility of human rights litigation as an avenue for redress for older persons forced to relinquish their animals” (2019, p. 217).

The case of John Chadwick (see section 1.1.2 of the commentary) is particularly relevant here. In 2017 he was told by Maidstone local authority to give up his two small dogs and cat for rehoming or face being made intentionally homeless (Slater, 2017). If he kept his companion animals and became intentionally homeless the local authority would have no duty to house him under Part VII, HA 1996 and he would face life on the streets. He reluctantly relinquished ownership of his companion animals and sadly committed suicide 10 days later. Had the human-companion animal relationship being recognised at that time as falling within Art.8 it would have strengthened his claim to be housed by the council in pet-friendly accommodation. Being required to relinquish well-behaved pets, on which John relied for valuable support, could be a disproportionate interference with his Art.8 rights.

(ii) Housing new council tenants who already own pets

Human rights arguments could apply where a local authority requires a person to relinquish their companion animal when moving into local authority owned housing. In this case it is the inclusion of the ‘no pet’ covenant in the secure tenancy agreement that is at issue. A tenant could use human rights arguments under Art.8 to negotiate with the landlord to exclude or amend the ‘no pet’ covenant to permit them to keep their well-behaved companion animal in their new home.

(iii) Persuading Parliament to enact new legislation to regulate the use of ‘no pet’ covenants

Since politicians are familiar with human rights arguments and understand the need to protect an individual’s convention rights, establishing that the human-companion relationship falls within Art.8 strengthens the argument for legislation to regulate the use of ‘no pet’ covenants. Once the human-companion animal relationship is accepted as coming within Art.8, the legality of ‘no pet’ covenants becomes a question of balancing competing convention rights between landlords and tenants. Parliament is best placed to balance the tenant’s private life and family rights under Art.8 against the private landlord’s property rights under Article 1 of Protocol 1 (Art.1, Prot.1), ECHR and to enact legislation to reflect that balance (considered at 6.7.1.1).

6.6 Private sector housing: Assured Shorthold tenancy (AST)

The majority of tenancies granted in the private sector in England are Assured Shorthold tenancies (AST). A key feature of ASTs is that the landlord is guaranteed the right to recover possession whether reasonable or not. Provided a landlord gives the tenant two months' notice, in the prescribed form he/she can recover possession (s.21 and s.8, HA 1988). For s.21, no grounds for possession nor fault on the part of the tenant is needed and significantly, the reasonableness test does not apply. A private landlord can respond to a tenant's breach of a 'no pet' covenant by simply terminating the lease under the s.8 procedure (which can be used where a tenant is in breach of covenant). The Renters' Reform Bill 2019-20 proposes to abolish no-fault evictions in England by removing s.21, HA 1988 (The Queen's Speech, 2019; Madge-Wyld, 2019) but no date has been set for placing the Bill before Parliament.

Generally, tenants cannot rely on human rights challenges against private landlords (although scholars have speculated as to the scope of horizontal effect in this context, (Luba, 2011; Pascoe, 2017)). The purpose of the ECHR is to protect citizens from infringement of their rights by the state and it is not intended to be directly enforceable between private individuals so as to alter their contractual rights and duties. This was recently confirmed in the context of a repossession by a private landlord in the case of *McDonald v McDonald* [2017] AC 273. The Supreme Court held that although a claim for repossession by a private landlord may engage Art.8, the judge could treat the issue of proportionality as already determined by the legislative provisions. The case involved a s.21 notice (HA 1988) and the court held this statutory regime left no room for individual assessment of the necessity or proportionality of the recovery of possession based on the defendant's personal circumstances (Nield, 2017). The court acknowledged the convention rights of a private landlord observing that any delay in granting possession would interfere with the landlord's right to peaceful enjoyment of his possessions under Art.1, Prot.1 ECHR. It stated that the relevant legislation (Protection from Eviction Act 1977 and Housing Act 1980),

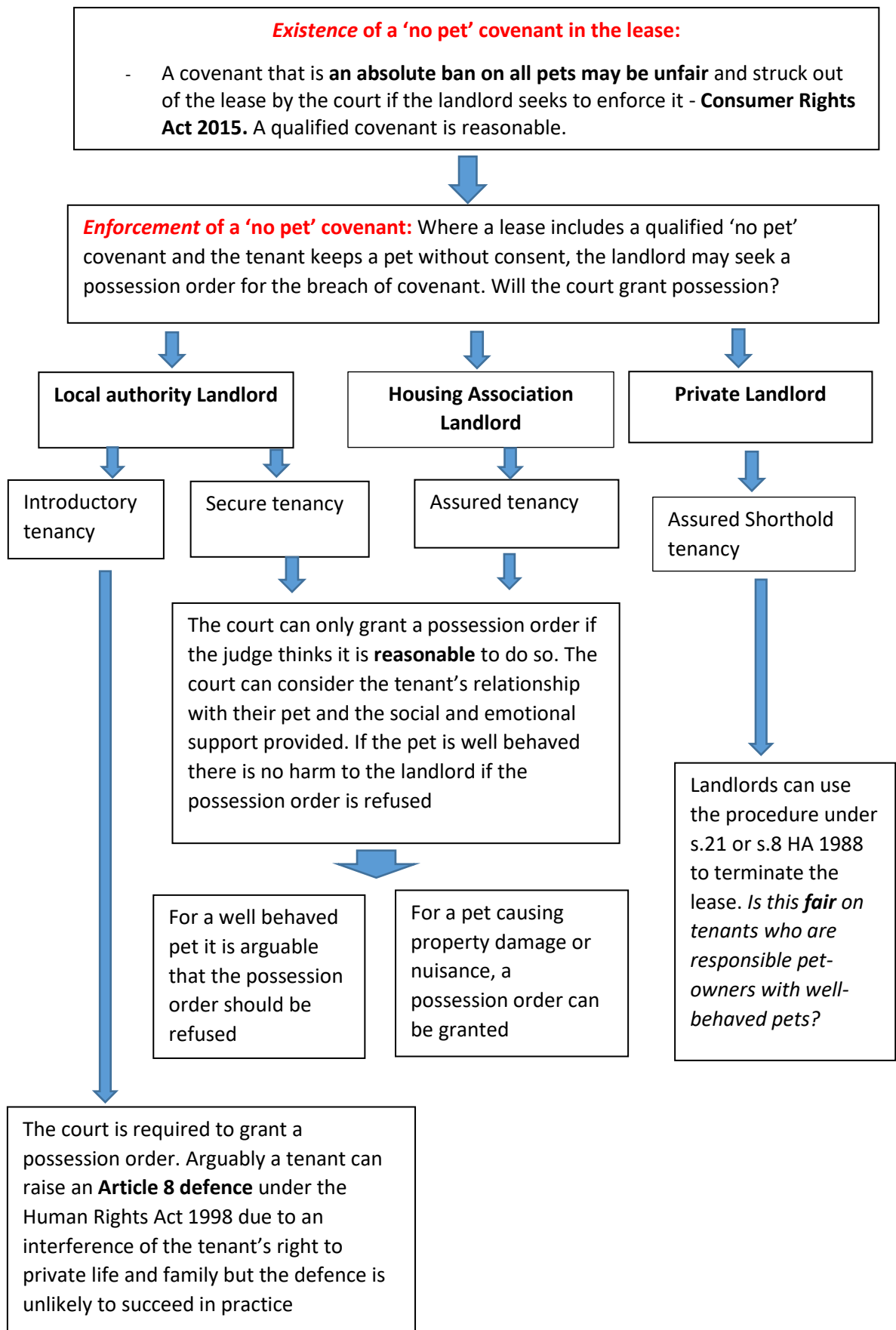
"reflect the state's assessment of where to strike the balance between the article 8 rights of residential tenants and the A1P1 rights of private sector landlords when their tenancy contract has ended" (at para.40).

Therefore, in the context of repossession by a private landlord there are clear legislative provisions in place in which a democratically elected legislature has already decided that the competing interests of the parties are properly balanced. In 2018, the European Court of Human Rights reiterated the English Supreme Court's decision that tenants facing a s.21 possession claim cannot invoke Art.8 (FJM v United Kingdom, App.No 76202/16).

In the absence of a reasonableness or proportionality test in possession proceedings in the private sector, pet-owning tenants have few options but to rehome their pets if they move into private rental housing with 'no pet' restrictions. Is it fair that tenants may be required to rehome a well-behaved dog or cat whom they view as part of their family and with whom they enjoy the benefit of a socially supportive relationship? Kate's story demonstrates the significant harm that tenants may suffer when required to rehome their pets due to a 'no pet' covenant (see Portfolio component 4, 5.4.2). Currently there is no law to govern the use of 'no pet' covenants so it is effectively left to the landlord's discretion. Given that 'no pet' covenants interfere with a right that is so important to many tenants, a right which arguably comes within Art.8 protection, it is appropriate for Parliament to decide how the balance between the competing interests of landlords and tenants is to be struck. In *McDonald* the court noted the policy reasons behind the introduction of ASTs and the role the HA 1988 played in reinvigorating the private residential rented sector in England which suffered from a reduced supply of quality housing. This reduced supply was attributed at the time to the effect of the security of tenure provisions in the Rent Act 1977, which were seen to favour tenants at the expense of landlords. Parliament considered there was a pressing social need to limit security of tenure enjoyed by tenants in order to revitalise the private rental sector and thereby make more homes available for the benefit of tenants. In this way the statutory regime introduced by the HA 1988 sought to balance the interests of the parties. Those opposed to legislation to regulate 'no pet' covenants may argue that introducing a restriction on the use of 'no pet' covenants may have a similar effect on the availability of private rentals to that attributed to the security of tenure provisions of the Rent Act 1977. If private landlords are required by legislation to permit pets into their rental property it could lead to a reduction in the supply and quality of private rental housing. However, there is no evidence (one way or the other) to address this concern. There is no evidence from overseas that legislative restrictions on the use of 'no pet' covenants causes a depleted supply of housing but further research is needed to identify if this is a genuine concern in England. A more complete assessment of the need for legislation to regulate 'no pet' covenants occurs later at 6.7.

To conclude my analysis of the two legal questions as to the existence and enforcement of 'no pet' covenants, *figure 15* summarises the position in England and thereby demonstrates the complexity and ambiguity of the existing law.

Figure 15 - 'No pet' covenants and the current law in England



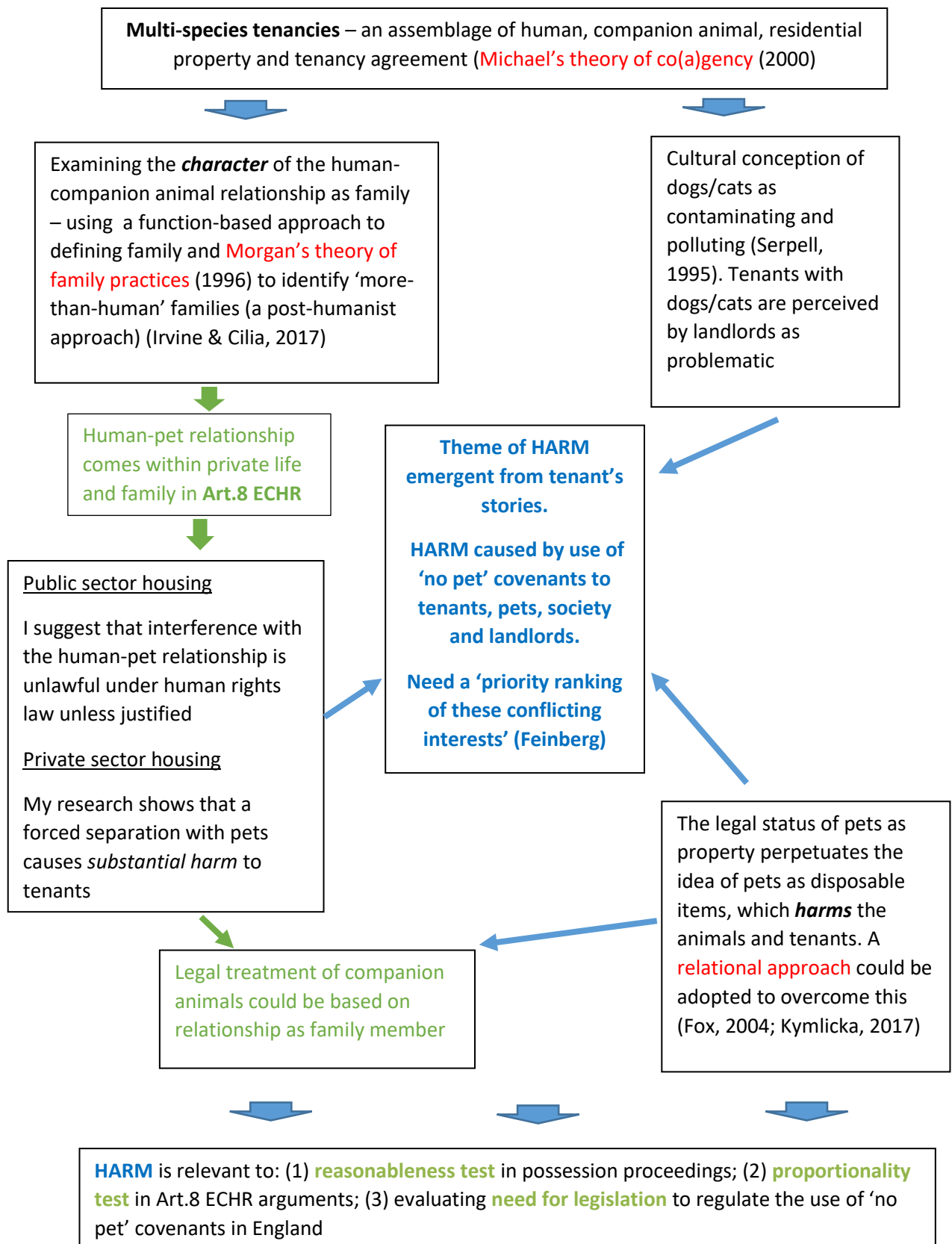
6.7 Assessing the need for legislation in England to regulate the use of ‘no pet’ covenants

This section uses my findings to address my research question 6: *Is there a need for change in housing law, policy and practice to regulate the use of ‘no pet’ covenants in residential leases in England?* Harm is a key theme to emerge from my data analysis. *Figure 16* demonstrates the links between the law and theory examined in my research and shows the significance of the Harm theme. This is relevant to assessing the need for new legislation in this section. My black letter law analysis in sections 6.4 – 6.6 shows the complexity and ambiguity of the existing law in England relating to the existence and enforcement of ‘no pet’ covenants. Given the scale of the use of these covenants, affecting millions of people, and the importance of the human-companion animal relationship to many tenants who construct their pets as family members, the current state of the law is unsatisfactory. Fox and Ray acknowledge the “*current regulatory gap*” in relation to older people moving into care homes and propose legislation to make obligations explicit, detail legal remedies and set out clear enforcement mechanisms (2019, p. 217). They emphasise the importance of undertaking a comprehensive consultation process with all stakeholders. I concur with their view that,

“the framing of responsive legislation must be informed by empirical research into the experiences of a range of stakeholders” (2019, p. 218).

My empirical research focuses on pet-owning tenants only and thereby provides a useful pilot study that paves the way for a more comprehensive study to examine the experiences of all the relevant stakeholders.

Figure 16 - Linking the law and theory and the significance of the Harm theme



My thesis proposes two frameworks for change either of which could be adopted by Parliament in assessing the need for legislation.

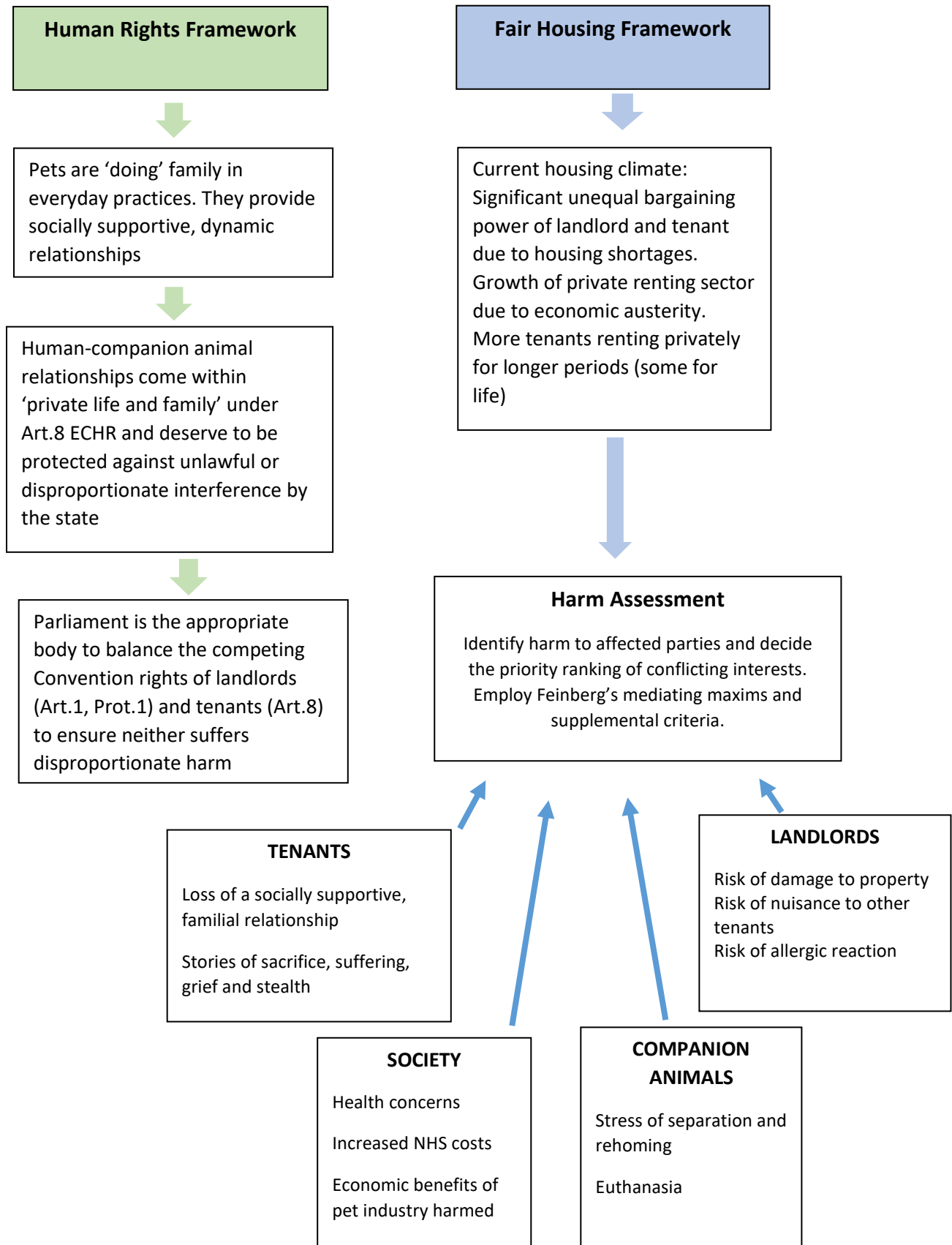
6.7.1 Two Frameworks for Change

My empirical work seeks to understand the experience of ‘no pet’ covenants for those tenants adversely affected by them. The overarching theme is one of significant harm to the tenants in numerous guises, for example, loss of home, loss of companion animal, poor quality housing and perceived discrimination with many of these harms linking to adverse effects on the tenant’s mental health. My findings encourage theorising the use and regulation of ‘no pet’ covenants from a Harm Assessment perspective. Significantly this approach is already used by the courts in assessing the reasonableness of granting possession orders (for example, in *Whitehouse v Lee*) and has been applied to a breach of a ‘no pet’ covenant in *Bell London and Provincial Properties Ltd v Reuben*. In addition, the avoidance of harm (by preventing potential damage to property and nuisance to neighbours) is the basis on which most private landlords justify their use of ‘no pet’ covenants (NLA, 2017).

For the tenant, the harmful effect of ‘no pet’ covenants arises from the relationship he or she has with their companion animal, a relationship that is socially supportive, dynamic and constructed as family in everyday practices. My findings as to the character of the human-companion animal relationship support theorising the relationship within the context of human rights, specifically Art.8 and the protection of ‘private life and family’ and consequently I suggest using a Human Rights Framework to explore the need for change in the legal regulation of ‘no pet’ covenants. However, human rights arguments have limited impact on contractual relations between private individuals and I propose a second framework for change, a Fair Housing Framework, to examine the need for a change in the law in the private rental sector. *Figure 17 – Two Frameworks for Change* provides a diagrammatic summary of these two frameworks.

Figure 17 - Two Frameworks for Change

Applying the frameworks to the use of 'no pet' covenants to assess the need for a change in the law



6.7.1.1 Human Rights Framework

Section 6.5.2.1 sets out my arguments for the human-companion animal relationship falling within private life and family under Art.8. One of the benefits of this approach is that it elevates the importance of the human-companion animal relationship in the eyes of those who have little or no knowledge or understanding of it. My interviewees Julia and Emma both experienced local authority housing officers who dismissed their relationship with their dogs as trivial and disposable. However, politicians, landlords and local authority officials all appreciate the importance of protecting human rights and are likely to take the human-companion animal bond more seriously if it is couched in these terms. Fox and Ray adopt a human rights approach in their study on the separation of older people from their pets in residential care homes and suggest that any new legislation would

“need to be firmly anchored in human rights norms” (2019, p. 218).

If the human-companion animal relationship comes within ‘private life and family’ under Art.8, interference by the state is justified provided it is lawful, in pursuit of a legitimate aim and ‘*necessary in a democratic society*’ which means that the interference is in response to a ‘*pressing social need*’ (Gillow v UK (1989) 11 EHRR 335 at para.132) and is proportionate. The principle of proportionality is important to my research because the use of ‘no pet’ covenants by local authority landlords can be seen to pursue a legitimate aim under Art.8(2), for example, the protection of the health or rights of other tenants, but even so the measures taken must be no more than are necessary to accomplish this legitimate aim.

“No matter how worthy the legitimate aim being pursued, the state cannot interfere with a person’s human rights disproportionately” (Rook, 2001, p. 39).

My book (Portfolio component 1, 2.3) provides a detailed examination of the principle of proportionality which is expressed in the case law as a ‘*fair balance test*’ (Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35; Gillow v UK (1989) 11 EHRR 355). A fair balance cannot exist where a person has to bear an excessive and disproportionate burden. Therefore, some restrictions on the keeping of pets is justifiable by local authority landlords provided there is proportionality between the aim to be achieved and the means of achieving it. The rights of the pet-owning tenant to maintain and develop supportive relationships with ‘others’ (whatever their species) needs to be balanced against

- (i) the rights of other tenants to protect their health and well-being (by prohibiting animals that cause a nuisance to neighbours or severe allergic reactions) and
- (ii) the need to prevent damage to social housing which is a valuable public resource.

This means that a ‘no pet’ covenant that prohibits a pet causing harm or a nuisance to others is justifiable but a blanket ban on all pets is disproportionate to the legitimate aim to be achieved because it excludes well-behaved pets that cause no harm and therefore interferes with the tenant’s private life and family for no justifiable purpose.

If Parliament proposes to enact new legislation that restricts the use of ‘no pet’ covenants in the private sector, landlords may seek to challenge this as contrary to their property rights under Article 1, Protocol 1 ECHR which states,

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions”.

The essence of Art.1, Prot.1 is that it is “*guaranteeing the right of property*” (*Marckx v Belgium (1979) 2 EHRR 330*) enabling an owner to own, possess, use or dispose of their property as they so desire without interference by the state. However, the broad terms of this guarantee are subject to a number of limitations and exceptions that dilute the strength of the guarantee. For the purposes of legislation to regulate the use of ‘no pet’ covenants, Art.1, Prot.1 protects

“the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest”.

Should Parliament decide to regulate the use of ‘no pet’ covenants it will constitute a control of the use of the landlord’s property under Art.1, Prot.1 (as opposed to a deprivation) and provided the control of use is justified and proportionate there will be no breach of Art.1, Prot.1 even though the landlord receives no compensation (Rook, 2001).

Any new legislation to regulate the use of ‘no pet’ covenants will engage competing convention rights – the tenant’s private life and family rights under Art.8 against the private landlord’s property rights under Art.1, Prot.1. It is arguable that if new legislation is drafted in terms that allow tenants to live with well-behaved companion animals but enables landlords to exclude pets that cause damage or nuisance, Parliament’s control of use of the private landlord’s property is justified and proportionate. It is justified bearing in mind the significant benefits of pet ownership for individuals (as detailed in section 1.4.2 of the commentary) and wider society including strengthening social capital in local communities (Wood *et al*, 2017), significant savings to the National Health Service (Hall *et al*, 2017) and contributing to a healthy economy. In 2018 consumer spending on pets and pet related products in the UK reached £4.94 million (Office for National Statistics, 2019). Therefore, considering the competing human rights of landlords and tenants and taking into account the benefits of pet ownership to local communities and the wider economy, it is important to ensure that a fair balance is struck. Parliament is best placed to balance these competing interests to ensure

proportionality exists and consequently it should not leave the question of keeping pets solely to the landlord's discretion. A private landlord is primarily motivated by personal financial investment and so it is for Parliament to take into account these wider societal benefits.

6.7.1.2 Fair Housing framework

Portfolio component 4, section 1, Part II (at 5.3) identified a number of themes (Rental Insecurity, Lack of Choice, Mental Health, Powerlessness in Negotiations and Perceived Discrimination) used here to demonstrate the need for the regulation of 'no pet' covenants. The current law leaves the use of 'no pet' covenants to the parties to negotiate under the legal principle of freedom of contract. However, the reality is that due to the changing housing sector, in particular housing shortages and the large rise of private rental housing a private landlord is free to dictate the terms of the tenancy agreement,

"because scarcity means that there are other tenants available to whom to rent"
(Arden, 2018, p. 3).

England adopts a dualist rental market with lightly regulated private rental housing together with a smaller but more regulated social housing sector. There has been a significant growth in private renting (Beckett, 2014) with home ownership being increasingly unaffordable and social housing rationed to those most in need. This leaves low-income earners with little option but to rent long term from a private landlord. Given the state of the current housing market, is it fair for private landlords to enjoy so much freedom to exclude cats and dogs from tenants' lives?

My reliance on the concept of fairness as a rationale for regulatory change in the context of 'no pet' covenants is not without concern. In contemporary times, the concept of fairness *"is peculiarly complex and emotional"* (Carr and Cowan, 2015, p. 85). In examining the rationale for introducing the bedroom tax in England in 2013, Carr and Cowan (2015) were critical of the Government's reliance on the concept of fairness arguing that,

"Fairness is, of course, a vehicular idea – it is entirely meaningless" (p. 83)

referring to

"the nature of its shallowness as a rationale"(p. 85)

by demonstrating the way it was also being used to challenge the bedroom tax. The same concept of fairness provided both the rationale for the Government to introduce the tax and a *"disruptive potential"* to challenge and undermine the policy (2015, p. 85). Nevertheless, fairness is the basis of recent changes in housing law in England and I feel that used in the context of a Harm Assessment it can provide a useful framework for legislative change. A

pet-owning tenant may say it is unfair to exclude their companion animal from their home and the landlord may say it is unfair to be forced to allow a pet to live in their property with the consequent risk of damage, but using fairness within the Harm Assessment permits reference to Feinberg's "*mediating maxims*" and "*supplemental criteria*" (1987, p.187) as discussed in section 1.10.1 of the commentary. The magnitude, probability and relative importance of the various harms to the parties can be weighed in the balance to determine which way the scales will tilt.

In its White Paper '*Fixing our broken housing market*', the Government relies on the concept of fairness for leaseholders to propose changes in the law (including the recently enacted Tenant Fees Act 2019). The rationale relies on the need to,

"ensure that the housing market is as fair for those who don't own their own homes as it is for those that do" (DCLG, 2017, p. 6).

This would be a valuable rationale in the hands of pet-owning tenants seeking pet-friendly rental housing. The Government's recent proposal to revise the Model Tenancy Agreement, to encourage landlords to permit well-behaved pets, champions the need for fairness in the light of the current housing climate in which more people are renting and for longer periods of time (MHCLG, 2020a). The Government states that it will be listening to tenants and landlords views on 'no pet' covenants,

"to see what more we can do to tackle this issue in a way that is fair to both" (MHCLG, 2020).

The need to ensure greater fairness in the changing housing sector recently led to the Renters' Reform Bill 2019-20 the purpose of which is to deliver a "*fairer rental market*" (Queen's Speech, 2019). In 2018, Australia (Victoria) cited fairness as the rationale for a legislative ban on the use of 'no pet' covenants in the private housing sector. Australia suffers from a similar shortage of rental housing to England (Pawson, Hulse and Morris, 2017) and there has been a similar large growth in the number of households renting property resulting in significant unequal bargaining power discrepancies between landlords and tenants. Victoria's legislative restriction on the use of 'no pet' covenants in residential leases sought to redress that imbalance.

To avoid disproportionate harm to either party, my Fair Housing approach involves assessing the harm to all the relevant parties from the use of 'no pet' covenants but also from their restriction. As examined in section 1.10.1 of the commentary, drawing on Feinberg's embellishment of Mill's 'harm principle', I propose a Harm Assessment approach to justify the use of legislation to regulate 'no pet' covenants in housing law. Such an approach first identifies the harm that landlords, tenants, companion animals and wider

society may suffer from both the use and the restriction of ‘no pet’ covenants (see section 1.10.1 and *Figure 3 – The Harm Assessment Approach* in the commentary) and then uses Feinberg’s concepts of priority ranking of conflicting interests and mediating maxims to provide the hypothetical legislator with a “*sensibly mediated harm principle*” (1978, p.194) to assess the legitimacy of state intervention.

Recently the Government acknowledged this need to balance the interests of pet-owning tenants and landlords in the context of ‘no pet’ covenants,

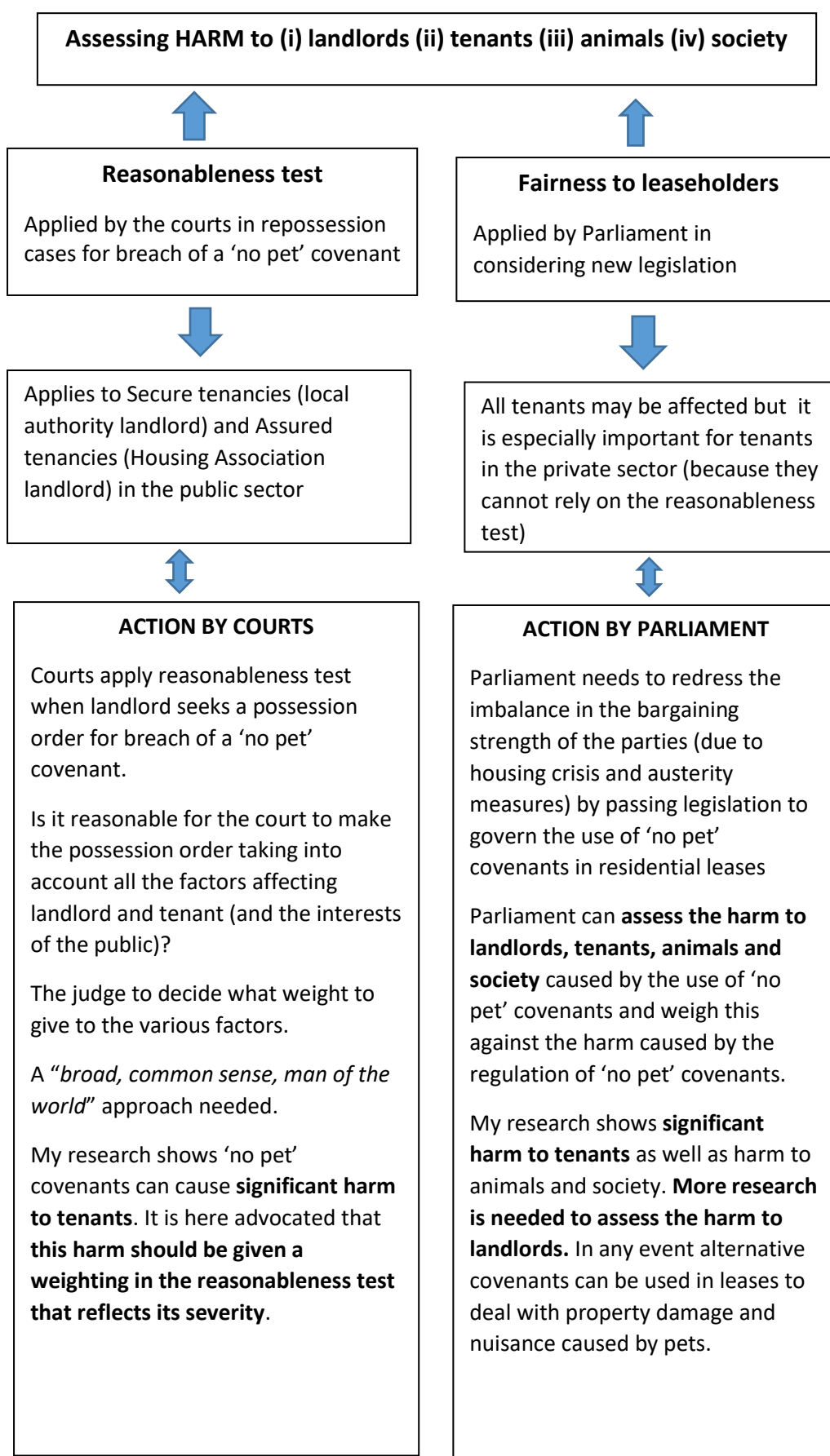
“The government is clear there should be a balance with responsible pet owners not being penalised ... and... landlords’ properties should be protected from damage by badly behaved pets” (MHCLG, 2020a).

This shows that the Government proposes to tackle the problem of ‘no pet’ covenants by balancing the interests of the parties to ensure a fair outcome is achieved and thereby adds credence to my Fair Housing approach which adopts a similar balancing exercise. The focus in my Fair Housing approach is on assessing the harm to the parties (this being landlords, tenants, companion animals and wider society) because harm arose as a significant theme from my empirical research. My research demonstrates the prospect of significant harm to tenants from the use of ‘no pet’ covenants in the form of sacrifice, loss, grief and risks to their mental health and this is especially so for vulnerable people such as older persons who rely on their companion animals for valuable social support. Similar to Feinberg’s notion of the aggregative nature of harm, my approach proposes that harm to animals and the harm to wider society be included in the relevant harm assessment. Taking the harm to the companion animals into account and weighing this against the landlord’s property rights is likely to be controversial but the use of a relational approach (see 1.7.2 of the commentary) enables the interests of the animals to be considered. Harm to wider society includes the economic burden of rehoming animals, curtailing the pet industry and increasing the costs on the health sector. Recent research estimated that pet ownership may reduce the cost to the National Health Service by almost £2.5 billion a year (Hall *et al*, 2016). There is currently very little research on the harm landlords suffer from allowing people and their pets to live together. *Figure 18* identified a number of possible harms from the limited literature available (Carlisle-Frank, 2005; Battersea, 2018; Cats Protection, 2019) but further research is needed to accurately identify the type of harm to landlords and its magnitude and probability. Alternative ways of avoiding harm to the landlord’s interests should also be considered in the Harm Assessment, for example, the use of leasehold covenants to cover damage to property or nuisance to neighbours which would provide a remedy in those circumstances where a pet caused damage and/or nuisance. The Tenant Fees Act 2019 needs to be

reviewed to allow landlords to ask for a refundable pet deposit to cover the risk of damage to property.

Figure 18 –The application of a Harm Assessment to ‘no pet’ covenants by courts and Parliament demonstrates the way in which the Harm Assessment approach can be used by the judiciary in the reasonableness test in possession proceedings and by Parliament in assessing the need for legislation to regulate the use of ‘no pet’ covenants in residential leases in England and indicates the contribution of my research to the Harm Assessment.

Figure 18 - The application by courts and Parliament of a Harm Assessment to 'no pet' covenants



6.7.2 Legislation in other jurisdictions

Comparison with the commonwealth countries of Canada and Australia provides useful examples of successful legislation that restricts the use of 'no pet' covenants in residential leases. In each case, the legislation provides exceptions to address the need to balance the interest of others especially the landlord.

In Canada (Ontario) an absolute 'no pet' covenant is void,

"A provision in a tenancy agreement prohibiting the presence of animals in or about the residential complex is void" (section 14, Residential Tenancies Act 2006).

However, a landlord is permitted to refuse to rent to a person who has a companion animal (Social Justice Tribunals Ontario, n.d.). This apparent inconsistency in the law appears to encourage dishonesty on the part of the tenant, or at least a failure to disclose the truth, as it is better for a tenant not to admit to having a companion animal until they have signed the lease. Once there is a tenancy agreement, the landlord cannot evict the tenant on the ground that he or she has a companion animal living in the property. Private landlords who grant a tenancy after 30 April 2018 are required to use the standard form Residential Tenancy Agreement (Ontario Central Forms Repository, 2018). Part 15 of the standard form allows for the inclusion of additional terms agreed between the parties but gives examples of void and unenforceable terms, the first example being, terms that do not allow pets.

The tenant's right to keep companion animals is not unfettered and provisions exist to balance the conflicting interests of parties. The landlord can apply to the Landlord and Tenant Board to evict a tenant with a companion animal where:

- (i) *The animal has substantially interfered with the reasonable enjoyment of the residential complex for all usual purposes by the landlord and other tenants; or*
- (ii) *The presence of the animal has caused the landlord or another tenant to suffer a serious allergic reaction; or*
- (iii) *The animal is of a species or breed that is inherently dangerous to the safety of the landlord or other tenants* (s.76, Residential Tenancies Act 2006, Part V).

Therefore, a tenant can be evicted if their companion animal becomes a nuisance, for example, causing unreasonable noise disturbances or damage to property or where the landlord or another tenant has a severe allergic reaction to the animal. In respect of grounds (i) and (ii), the Board shall only make an order for terminating the tenancy and evicting the tenant if it is satisfied that the animal kept by the tenant caused or contributed to that substantial interference or allergic reaction and the landlord will need to provide evidence of this. What amounts to 'substantial interference' in (i) will depend on the facts of the case but common sense and reasonableness prevail. For example, in respect of noise disturbance, it would be unreasonable to require absolute silence from a pet, so the occasional short period of barking from a dog is reasonable and neighbours can expect to tolerate this. However,

excessive barking at unsociable hours is likely to constitute a substantial interference and the tenant risks eviction (Rook, 2018). The Act also provides that the commission of an illegal act is a ground for a tenant to be evicted. Within this context, an illegal act is a broader concept than a criminal offence. Consequently, failure to abide by animal control byelaws applicable in the local jurisdiction, for example, any licensing or micro-chipping requirements or requirements to pick up dog faeces constitute an illegal act and thereby provide a ground for terminating the tenancy. The Ontario legislation provides a valuable example of how to regulate the use of 'no pet' covenants in a way that balances the competing interests of the respective parties (landlords, pet-owning tenants, neighbouring tenants, companion animals and wider society). It permits responsible pet owners to live with well-behaved pets while also addressing the needs of landlords and other tenants to protect their property or their enjoyment of their home environment. As with many laws there will be definitional hurdles for any new English law governing 'no pet' covenants, for example,

"Defining what constitutes an 'authorised domestic pet' is unlikely to be easy, let alone framing exceptions to this general rule" (Fox and Ray, 2019, p. 217).

However, drawing on the examples of existing successful legislation in commonwealth countries makes this hurdle less onerous. Australia (Victoria) passed legislation in 2018 enacting a number of amendments to its Residential Tenancies Act one of which included giving tenants the right to keep pets which came into force in March 2020. Tenants must first obtain the landlord's consent which can only be refused by order of the Victorian Civil and Administrative Tribunal. The law includes similar exceptions to those in the Ontario legislation that protect the interests of landlords and neighbouring tenants.

France was the first country to implement legislation to prohibit 'no pet' covenants in residential leases. It enacted legislation in 1970 stipulating that any prohibition of pets in residential tenancies is deemed to be void (Article 10 of the Law of 9 July 1970). The right of the tenant to be able to keep a companion animal is subject to the requirement that the animal does not cause damage to the property or disturbance to the enjoyment of other occupants (including the landlord). A clause banning dangerous dogs is also permissible. Until recently it was thought that this law only applied to long residential leases, but in February 2011 the French Supreme Court ruled that Article 10 also applies to holiday rental properties so landlords cannot refuse to accept companion animals holidaying with their owners (*Association Union fédérale des consommateurs de l'Isère - Que Choisir v. Association Clévacances Isère*). Although France has a very different legal system to England, the fact that the law restricting the use of 'no pet' covenants has existed there for 50 years without the need to revoke it, and the fact that the scope of that law has been

recently extended to include holiday rentals, demonstrates that such legal governance of ‘no pet’ covenants can work in practice.

6.7.3 Positive pet policies in social housing in England and overseas

In considering the question of pets in social housing, public sector landlords have responsibilities to protect the interests of all their tenants. Therefore, the use of ‘no pet’ covenants as controllers of risk is not limited to the avoidance of property damage but also includes wider concerns such as the health and safety of all their tenants. This can be particularly relevant with older persons living in local authority care homes (Smith, Johnson and Rolph, 2011). Whilst acknowledging that social housing providers need to protect the interests of all tenants, not just pet owners, there is no reason why both cannot be achieved as long as laws, regulations and tenancy agreements are correctly drafted to ensure responsible pet ownership. Examples of countries where social housing adopts a positive pet policy include the USA and New Zealand; a blanket ban on pets is prohibited in the USA for all public housing that receives Federal funding (Housing and Urban Development Department, 2000) and in New Zealand the statutory corporation and Crown agent that is the largest provider of social housing, Housing New Zealand (now called Kāinga Ora), announced in 2018 its decision to implement a positive pet policy in all its housing,

“Pets have benefits for our customers, particularly for the tamariki [children in Maori] in our homes and for customers who live alone. We have moved to a more permissive approach to pet ownership and now allow customers to have a pet in their home subject to certain conditions” (Housing New Zealand Annual Report 2017-18, p. 43).

The change in policy was based on the desire to improve the quality of life for its tenants and relied on research demonstrating the numerous benefits of living with a pet especially for those living alone. Significantly for my research there are examples of positive pet policies in social housing in England. Research involving all the local authority landlords in London and the 30 largest Housing Associations there found that none of them impose a blanket ban on all their tenants but only 48% of local authority landlords allow all tenants to keep a cat and this falls to 24% for dogs (Battersea, 2018, p. 6). However, there are examples of local authority landlords that allow all their tenants to keep pets including cats and dogs; Wandsworth Council and Harrow Council fall into this category and demonstrate that such a policy can work in practice. Wandsworth council has an Animal Welfare Service with a dedicated team of officers who manage dogs on the estate by implementing a dog registration scheme, enforcing dog byelaws, using anti-social behaviour orders where appropriate, educating tenants on responsible dog ownership and monitoring animal welfare (Wandsworth, n.d.).

These examples show that positive pet policies can, and do, work in the social housing sector, especially where comprehensive policies are in place, preferably in a “*stand alone document*” (Battersea, 2018, p. 7) which promote responsible pet ownership, for example, restrict breeding, limit the number of dogs and cats in each unit, ensure the animals are vaccinated and neutered and meet the welfare needs of the animal. If permission to keep the pet is made conditional on the tenant complying with these standards then the interests of all parties (including the companion animal) are protected.

6.8 Conclusion

This component of the portfolio addressed my research questions 4, 5 and 6 and critically examined the current law affecting the existence and enforcement of ‘no pet’ covenants in England with a view to assessing the need for new laws to regulate their use. Using the findings from my literature review and the analysis of my interview data, I argued that the human-companion animal relationship falls within ‘private life and family’ in Art.8 ECHR and can therefore be protected under human rights law. In assessing the need for legislation to govern the use of ‘no pet’ covenants, I propose two frameworks for change: one based on human rights and the other on the concept fairness within a Harm Assessment calculation. Harm was one of the key themes to emerge from my data and is a relevant factor in both the reasonableness test in possession proceedings and the proportionality test in human rights arguments. It therefore has a valuable role in helping Parliament to assess the need for legislation to regulate the use of ‘no pet’ covenants in residential leases in England.

Appendices

Appendix 1: Scottish Parliament briefing paper



Briefing for the Public Petitions Committee

Petition Number: [PE1706](#)

Main Petitioner: Geraldine Mackenzie

Subject: Keeping pets in rented and supported accommodation

Calls on the Parliament to urge the Scottish Government to introduce a law to allow all Scottish residents who live in rented and supported accommodation to let their pets live with them.

Background Benefits of pet ownership

The Petitioner refers to journal article²⁰ on the human-companion animal relationship in housing law and policy. The article cites evidence to suggest that owning a pet can reduce isolation and loneliness and can have physical health benefits such as lowering the risk of death by cardiovascular disease.

Pets in rented and supported housing

There is no legislation in Scotland which specifically ban pets from being kept in rented or supported accommodation.

Tenants will have a tenancy agreement with their accommodation provider which will set out the rights and responsibilities each party. Whether pets can be kept in the property will depend on the landlord's policy.

²⁰ Rook, D. 2018. 'For the Love of Darcie: Recognising the Human–Companion Animal Relationship in Housing Law and Policy' *Liverpool Law Review*: 29-46

For example, some landlords may place a general condition in their tenancy agreements that pets cannot be kept. However, in practice, how and whether this condition is enforced will vary. Many tenants will keep pets and landlords will only seek to take action against them if the pets are causing a nuisance to neighbours.

Some social landlords may have a specific pet policy which allows pets to be kept under certain circumstances. For example, some housing associations that specialise in providing housing for the elderly recognise the benefits that pets can bring for their tenants.²¹

In some cases, tenants may have to seek permission from their social landlord to keep a pet. Landlords may consider each application on its merits. If permission is granted to keep a pet, there may be conditions involved. For example, a condition could include that dogs can only be walked outwith the development grounds. In some cases, the landlord might impose a general rule such as that dogs cannot be kept in communal stair flats.

The journal article²² the Petitioner refers to suggests that there are legal precedents which support legislation that bans 'no pet' covenants. The journal article gives examples of legislation in other countries, including France and parts of Canada, that prohibits the use of 'no pet' covenants. Such legislation also seeks to protect the rights of landlords and other tenants; for example, there may be exclusions for pets which are a nuisance or which cause severe allergic reactions.

Scottish Parliament/ Scottish Government action

In April 2018, it was reported in the media²³ that Scottish Labour environment spokesperson, Claudia Beamish MSP, wanted the default position to be that pets should be allowed in rented, supported, or temporary accommodation, unless there is evidence that the animal is causing a nuisance.

In response to this, a spokeswoman for the Scottish Government was quoted as saying:

"We want to ensure that all elderly and vulnerable people are fully supported in finding and keeping a home that works for them.

"Decisions around keeping pets are for individual accommodation providers, however, we would encourage them to take a practical and considered approach

²¹ For example, Hanover Scotland and Bield Housing Association will allow their tenants to keep pets in certain circumstances.

²² Rook, D. 2018. 'For the Love of Darcie: Recognising the Human–Companion Animal Relationship in Housing Law and Policy' *Liverpool Law Review*: 29-46

²³ For example, see Scotsman 9 April 2018, <https://www.scotsman.com/news/politics/letelderly-scots-keep-beloved-pets-in-care-homes-says-labour-1-4720779>

that removes any potential for distress or difficulties, and ensures elderly and vulnerable people have a positive outcome."²⁴

Kate Berry
Senior Researcher, SPICe 19
September 2018

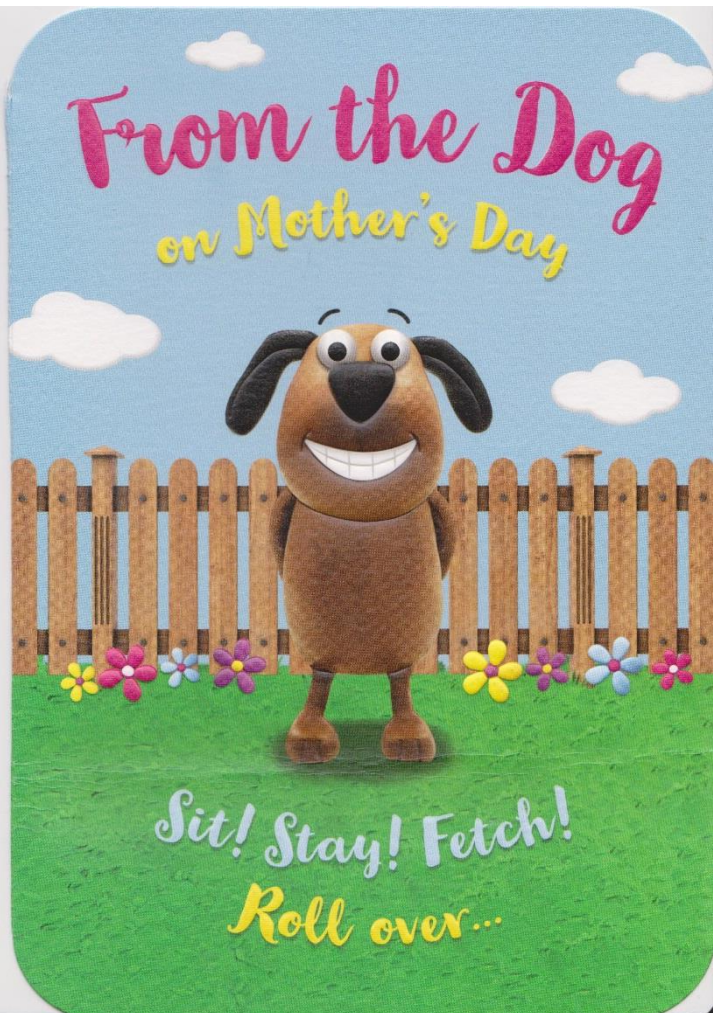
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²⁴ Glasgow Live Plans to introduce paws clause allowing elderly to keep their pets in care homes.
<https://www.glasgowlive.co.uk/news/glasgow-news/their-pets-in-care-homes-14506828>

Appendix 2: Mother's day card



Appendix 3: My process of coding – moving from codes to identifying key themes

List of 45 NVivo nodes from my first stage of coding

Ambivalence – embarrassed

Ambivalence – flexible personhood

Ambivalence – other people

Animal instinct model

Animal's personality

Balancing interests

Caring practices – pet as carer

Caring practices – pet as dependent

Childhood pets

Choice

Coping with death

Coping with loss

Discrimination in housing

Endowed with agency – anthropomorphic model

Endowed with agency – changing everyday practice – positive

Endowed with agency – changing everyday practice – detriment

Family practices – access to home spaces

Family practices – everyday routines

Family practices – sleeping arrangements

Hierarchical relations – dominance and submission

Identity as a dog or cat person

Impact of covenant on home

Impact of covenant on tenant's mental health

Landlord's reasons

Mental stress of covenant

Motivation for acquiring a pet

Pets influencing household decisions

Poor quality housing

Powerlessness in lease negotiations

Provision of support – emotional benefits

Provision of support – physical health benefits

Provision of support – safety

Provision of support – trust

Relinquish pet

Rental insecurity

Searching for pet-friendly house

Social actor – facilitate bonding within family

Social actor – community and social lubricant

Social actor – conflict

Societal waste due to covenant

Status of pet – as an animal (not a furry human)

Status of pet – property model

Status of pet – family (parent-child model)

Status of pet – friend model

Welfare of companion animal

The link between the 45 codes and the seven themes

1. Agency

Animal's personality

Endowed with agency – anthropomorphic model

Endowed with agency – changing everyday practice – positive

Endowed with agency – changing everyday practice – detriment

Family practices – access to home spaces

Family practices – everyday routines

Family practices – sleeping arrangements

Pets influencing household decisions

Social actor – facilitate bonding within family

Social actor – community and social lubricant

Social actor – conflict

Status of pet – as an animal (not a furry human)

2. Support

Caring practices – pet as carer

Caring practices – pet as dependent

Provision of support – emotional benefits

Provision of support – physical health benefits

Provision of support – safety

Provision of support – trust

Motivation for acquiring a pet

Status of pet – family (parent-child model)

Status of pet – friend model

3. Ambivalence

Ambivalence – embarrassed

Ambivalence – flexible personhood

Ambivalence – other people

4. Rental Insecurity

Rental insecurity

5. Lack of Choice

Choice

Poor quality housing

Searching for pet-friendly house

6. Powerlessness in Negotiations and perceived Discrimination

Discrimination in housing

Powerlessness in lease negotiations

7. Mental Health

Coping with death

Coping with loss

Impact of covenant on home

Impact of covenant on tenant's mental health

Mental stress of covenant

Relinquish pet

Codes not attached to a theme

Childhood pets. This was useful in providing background information about the participants.

Hierarchical relations – dominance and submission. This was only relevant to one participant, Julia, who had worked with dogs all her life including as a dog trainer and in dog kennels. It did not have wider relevance so I excluded it.

Identity as a dog or cat person. This was relevant to the participant's identity and how they saw themselves.

Landlord's reasons. Since this data was provided by tenants and not the landlords I did not feel that it could be reliably used to explore the reasons why landlords prohibit pets. I used existing research on landlords reasons.

Societal waste due to covenant. This was useful when thinking about the harm to society in my analysis chapter

Status of pet – property model. This code was deduced from the literature review but as none of my participants referred to their companion animal as property, no data populated this code.

Welfare of companion animal – this was useful when thinking about the harm to animals in my analysis chapter.

Appendix 4 - Interview Guide 2018

The participant's experience of a 'no pet' covenant in their lease and the effect of the covenant on them

First = go through Research Information sheet and sign consent form

Second = discuss photographs

Topic 1: Nature of relationship with pet(s) - *I am interested in hearing your story about your relationship with your pet.*

Could you tell me the story of your pet?

For how long has this pet lived with you?

Explain all the ways you interact with your pet on a typical day.

How does your pet benefit you?

What words would you use to describe your relationship with your pet?

Why did you get this pet – motivation?

Did you have pets as a child? (your history of pet ownership)

Photograph (max.2)- choose photos that show me something about your relationship with your pet.

Could you tell me more about this photo? (What is the story behind this photo?)

Why did you choose to show me this particular photo?

What does this photo say about your relationship with your pet?

[Please can I take a copy of this photo?]

Topic 2: Experience of the 'no pet' covenant

History of lease

What type of lease do you have and who is the landlord (private, public, housing assoc)?

What is the length of term of the lease?

History of the lease = what were the events that led up to signing this lease?

Did you have problems finding a pet friendly property?

What factors influenced you to rent this particular property?

Did you know about the 'no pet' covenant prior to signing the lease?

Interaction with landlord/letting agent

Did you try to negotiate with the landlord to be allowed to keep pets?

*If yes, **what reasons did the landlord give** for refusing to let you keep pets?*

If no, why did you decide not to negotiate with the landlord?

What reasons influenced you to sign the lease (even with a no pet covenant)?

Outcome

What was the outcome of the dispute – where does the pet live now?

How do you feel about the outcome of the dispute?

***What words describe how you feel** (having to give up your pet/being unable to keep a pet)?*

Impact

What impact did the ‘no pet’ covenant have on you? (e.g. hiding pet from landlord, insecurity from being caught)

What impact did the dispute over keeping pets have on you at the time?

Finding a new pet friendly property

Do you plan to find a pet friendly property in the near future?

What factors prevent or restrict you from moving into a pet friendly property?

Overall experience

What key words would you use to describe your experience of having a ‘no pet’ covenant in your lease?

Background information (if not already covered in interview)

Age group – 20-30; 30-40; 40-50; 50-60; 60+

Occupation –

Any children?

Length of time owning this pet –

At the end of the interview:

Thank you

Give counselling details (if participant upset talking about losing pet)

Take copy of photographs

Ask if I can send them a **transcript of the interview** to allow them an opportunity to comment on the contents and add further details or clarify points made or even change their mind about something they have said. Transcript can be emailed or posted (get appropriate address if needed).

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